Supreme Court, U. S.
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# APPENDIX

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

**No. 74-753**

UNITED STATES OF AMERICA,

*Petitioner,*

—v.—

HERMAN R. TESTAN AND FRANCIS L. ZARRILLI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR A WRIT OF CERTIORARI FILED DECEMBER 16, 1974
CERTIORARI ALLOWED FEBRUARY 18, 1975

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## INDEX TO THE APPENDIX


| | Page |
|---|---|
| Docket Entries | 1 |
| Petition [Filed March 28, 1972] | 5 |
| Answer [filed May 30, 1972] | 12 |
| Civil Service Commission Position Classification Standards, General Attorney Series (Defendant's Exhibit #3) [filed June 27, 1972] | 14 |
| Trial Judge's Opinion, Findings of Fact, and Conclusions of Law [filed September 14, 1973] | 43 |
| Order of Mr. Chief Justice Berger extending the time for filing a Petition for a Writ of Certiorari to November 16, 1974 [filed October 17, 1974] | 118 |
| Order of Mr. Chief Justice Burger further extending the time for filing a Petition to December 16, 1974 [filed November 19, 1974] | 119 |
| Order of the Supreme Court allowing Certiorari [filed in the Supreme Court February 18, 1975] | 120 |

IN THE UNITED STATES COURT OF CLAIMS

No. 128-72

DOCKET ENTRIES

| DATE | PROCEEDINGS |
|---|---|
| Mar 28 1972 | Filing fee of $11 paid by plaintiffs. |
| Apr 6 1972 | See 102-72 for order referring case to Commissioner Louis Spector. |
| May 30 1972 | Defendant's answer to the petition filed. Copies (13) to atty. |
| Jun 27 1972 | Commissioner's memorandum of pretrial conference together with plaintiffs exhibits 1 thru 5 and defendant's exhibits 1 thru 3 filed. Copy to parties. |
| Aug 2 1972 | Plaintiffs' motion for call upon the Secretary of the Air Force filed. Copies (3) to deft. ALLOWED SEP 7 1972 and issued. (SEE COURT'S ORDER OF OCT 16 1972). |
| Aug 7 1972 | Defendant's motion for extension of time (to August 25, 1972) to reply to motion for call filed. Copies (2) to atty. ALLOWED AUG 23 1972. |
| Aug 25 1972 | Defendant's motion for extension of time (to August 30, 1972) to file response to motion for call filed. Copies (2) to atty. ALLOWED AUG 30 1972. |
| Aug 30 1972 | Defendant's response to plaintiffs' motion for call filed. Copies (2) to atty. |
| Sep 6 1972 | Plaintiffs' reply to response to motion for call filed. Copies (4) to deft. |
| Sep 15 1972 | Defendant's request for review of the commissioner's order of September 7, 1972, filed. Copies (2) to atty. (SEE COURT'S ORDER OF OCT 16 1972). |

| DATE | PROCEEDINGS |
|---|---|
| Sep 28 1972 | Plaintiffs' motion for leave to file opposition, with affidavit, to defendant's request for review of the commissioner's order of September 7, 1972, filed. Copies (2) to deft. ALLOWED SEP 29 1972. |
| Sep 29 1972 | Plaintiffs' opposition to defendant's request for review of the commissioner's order, etc. filed. Copies (2) to deft. |
| Oct 16 1972 | Court filed order allowing defendant's request for review, and that the trial commissioner's order of September 7, 1972, is vacated and plaintiff's motion for call is denied. Copy to parties. |
| Nov 28 1972 | Commissioner's order closing proof, etc. filed. Copy to parties. |
| Dec 26 1972 | Plaintiffs' motion for extension of time (to February 1, 1973) to file requested findings, etc. filed. Copies (2) to deft. ALLOWED JAN 9 1973 |
| Jan 22 1973 | Plaintiffs' requested findings of fact and brief filed. Copies (2) to deft. |
| Feb 21 1973 | Defendant's motion for extension of time (to April 2, 1973) to file requested findings, etc. filed. Copies (2) to atty. |
| | ALLOWED MAR 9 1973. |
| Apr 2 1973 | Defendant's requested findings of fact, etc. filed. Copies (2) to atty. |
| Apr 27 1973 | Plaintiffs' objections to defendant's requested findings, etc. filed. Copies (2) to deft. |
| Sep 14 1973 | Trial judge's opinion and findings of fact filed. Copies to parties. |
| Oct 15 1973 | Defendant's notice of intention to except to the trial judge's opinion filed. Copies (2) to atty. |



| DATE | PROCEEDINGS |
|---|---|
| Oct 24 1973 | Defendant't motion for extension of time (to December 13, 1973) to file its brief and exceptions filed. Copies (2) to atty. |
| | ALLOWED NOV 2 1973 with no further extension to be granted except for extraordinary circumstances. |
| Oct 30 1973 | Plaintiffs' objection to motion for time extension filed. Copies (2) to deft. |
| Oct 31 1973 | Defendant's reply to objection to motion for time extension filed. Copies (2) to atty. |
| Dec 13 1973 | Defendant's brief and exceptions filed. Copies (13) to atty. |
| Dec 20 1973 | Plaintiff's motion for leave to file notice of intention to except out of time filed. Copies (2) to deft. |
| | ALLOWED JAN 18 1974, see endorsement on motion. |
| Jan 2 1974 | Defendant's response to motion of December 20, 1973 filed. Copies (2) to atty. |
| Jan 14 1974 | Plaintiffs' reply to response of January 2, 1974, filed. Copies (2) to deft. |
| Jan 14 1974 | Plaintiffs' motion for extension of time (to February 16, 1974) to file exception and brief filed. Copies (2) to deft. |
| | ALLOWED JAN 25 1974. |
| Jan 18 1974 | Plaintiffs' notice of intention to except filed. Copies (2) to deft. |
| Feb 13 1974 | Plaintiffs' brief and exception to the trial judge's opinion filed. Copies (13) to deft. |
| Mar 4 1974 | Defendant's motion for extension of time (to April 4, 1974) to file reply brief filed. Copies (2) to atty. ALLOWED MAR 20 1974. |

| DATE | PROCEEDINGS |
|---|---|
| Apr 4 1974 | Defendant's reply brief filed. Copies (13) to atty. |
| May 28 1974 | Court entered order that this case will be heard by the court en banc on the June 1974 calendar. Copy to parties. |
| Jun 6 1974 | Argued and submitted on the merits. Copies of referred to dictionary to be supplied by plaintiffs. |
| Jul 19 1974 | The case is remanded to the Civil Service Commission for the conducting of further proceedings consistent with the order of remand. Opinion Per Curiam. Dissenting Opinion by Judge Skelton in which Senior Judge Laramore and Judge Bennet join. |
| Oct 3 1974 | Plaintiffs' motion to file out of time motion under Rule 151 to amend the judgment filed [motion for leave is the motion to amend the judgement]. Copies (2) to deft. |
| Oct 10 1974 | Defendant's response to motion for leave to file out of time filed. Copies (2) to atty. |
| Oct 18 1974 | Plaintiffs' reply to response to motion for leave to file out of time filed. Copies (2) to deft. |
| Nov 1 1974 | Court entered order amending the court's order of July 19, 1974, as set forth in the order. Copy to parties. |
| Dec 19 1974 | Notice of filing by Defendant in Supreme Court of a petition for writ of certiorari filed. (Date: Dec. 16, 1974; No. 74-753). |
| Dec 26 1974 | Defendant's motion for extension of time (45 days after the U.S. Supreme Court rules) to comply with order of remand filed. Copies (2) to atty. ALLOWED JAN 14 1975. |
| Feb 24 1975 | Order of the Supreme Court, dated February 18, 1975, granting the petition for a writ of certiorari filed. |



IN THE UNITED STATES COURT OF CLAIMS

No. 128-72

[Filed March 28, 1972, Court of Claims]

HERMAN R. TESTAN,
2301 Shelmire Avenue, Philadelphia, Pa. 19152,

FRANCIS L. ZARRILLI,
2729 Kent Road, Broomall, Pa. 19008, PLAINTIFFS

*v.*

THE UNITED STATES, DEFENDANT

## PETITION

1. On and before May 8, 1970 the plaintiffs were employed by defendant under the Classified Civil Service as Trial Attorneys, classified at Grade GS-905-13 in the Office of Counsel, Defense Personnel Support Center, Defense Supply Agency, Philadelphia, Pa.

2. The Position Description assigned to the Trial Attorney position GS-905-13 was as follows:

"JOB SUMMARY

"Serves as Trial Attorney in connection with appeals before the Armed Services Board of Contract Appeals (ASBCA) of the Department of Defense which arise under the contracts at DPSC. Appeals to the ASBCA are from Contracting Officers' decisions involving disputes arising as a result of claims by the contractor or the Government in connection with performance or termination of contracts, as, for example, additional costs incurred by the contractor in being furnished defective Government material; additional costs incurred by delays resulting in stoppage or slowdown of production; additional costs or savings involved in defects in or changes of specifications; controversial interpreta-

tions of contract provisions; termination of contracts for the convenience of the Government; excusability of delays giving rise to termination of contracts for default; etc. Utilizes a specialized knowledge of Government contract law in performance of job.

"JOB CONTROLS

"Receives general supervision from Chief Trial Attorney which includes assignment of cases, discussion, conferences and information as to new or revised policies, discussion of unusual and complex problems; incumbent functions independently during progress of assignment with full technical responsibility and wide latitude of discretion. Review is made of contemplated actions as required for adherence to established policy and/or need for additional legal theory.

"MAJOR DUTIES

"1. *Prepares appeal action for trial and presents before the Armed Services Board of Contract Appeals*: Assembles and analyzes complete claims files which are involved in actions brought by or against the Government (Contract, GFP, Inspection, Laboratory, Fiscal); studies the files and defines factual and legal issues. Prepares a complete statement of all the facts in the case, including those which require further development, a statement of any difficulties encountered during administration of the contract, showing how disputes arose and were resolved, and prepares physical exhibits to substantiate the stand taken. Investigates the facts. Selects, interviews and prepares prospective witnesses, including expert witnesses for examination and cross-examination at trial; prepares statements and affidavits. Points up those facts which are most advantageous to the Government and the legal arguments which are best supported by precedent decisions, when available. Researches law; prepares and files Answer to Complaint or memorandum in Lieu of Answer, determin-



ing what issues should be controverted, admitted, etc. Prepares and argues all applicable motions and presents evidence in connection therewith. Prepares Trial Memorandum, opening and closing statements, citations of law and relevant documents for orderly presentation of Government's case. Forwards a copy of each Notice of Appeal, Complaint, Answer, Rule Memorandum (without inclosures), Brief, and ten days prior to date set for hearing, Trial Memorandum containing a summary of the testimony of proposed witnesses to the Counsel, DSA. Amends Answer when deemed necessary or when required by the Board. Participates in pre-hearing conferences before the Board and/or pre-hearing meetings with appellant's attorney to consider simplification of the issues, desirability of amendments of the pleadings, possibility of obtaining admissions of fact and stipulation as to admission into evidence of documents which will avoid unnecessary proof, limitation of the number of expert witnesses and such other matters as may aid in disposition of the appeal or shortening the time and expense of the trial. When deemed appropriate, incumbent may move the Board for permission to serve Written Interrogatories or take Oral Depositions. Arranges with the Board, appellants and/or their attorneys for time and place of trial. Determines, when in the best interests of the Government, that a particular case should be settled and negotiates terms of the settlement, with the discussion and advice of the Chief Trial Attorney. Conducts actual trial of the case, cross-examines appellants' witnesses, when advisable, interposes objections to appellant's offer of proof when appropriate, stipulates as to facts, offers such relevant evidence as deemed advisable and admissible under the generally accepted rules of evidence applied in the Courts of the United States in non-jury trials. Studies the transcript and all exhibits; after conclusion of the trial prepares post-trial briefs and reply or rebuttal briefs when appropriate.

"2. *Reviews ASBCA decisions and takes necessary action as determined advisable*: Reviews all decisions of ASBCA on appeals handled. Files a Motion for Reconsideration with ASBCA based upon determination that decision is erroneous in whole or in part after consultation with Chief Trial Attorney. If ASBCA denies the Motion or sustains its previous decision and a decision by the Comptroller General (GAO) is desired prior to payment forwards request for such a decision to the Counsel, DSA. Maintains direct contact with the ASBCA, appellants and/or their attorneys, other Governmental agencies, witnesses, etc. in all matters involving assigned appeals.

"Performs other duties as assigned."

Counsel for the Defense Personnel Support Center has stated that:

". . . The assignment of cases [as between the Chief Trial Attorney and the plaintiffs, Trial Attorneys] is accomplished on a random basis depending solely on the workload of the 3 members of the trial section at the time of assignment. Once a case is assigned, the particular attorney assumes complete and sole responsibility therefor, using independent judgment in development of the theory of the case, selection of witnesses, use of trial tactics and strategy, preparation of all pleadings, motions, briefs, correspondence, etc., until a final decision is rendered by the Armed Services Board of Contract Appeals; or, if warranted by applicable facts and law in the sole judgment of the assigned attorney, the case may be settled before, during or after trial."

3. General Attorney Series GS-905-0, issued by the United States Civil Service Commission, provided an Evaluation Plan which set forth as main categories or factors: (1) *nature of the case or legal problem* and (2) *level of responsibility*. Plaintiffs' duties, according to the provisions of said General Attorney Series GS-905-0, are properly evaluated as falling within Type III under the



factor: *nature of the case or legal problem*, and Level D under the factor: *level of responsibility*, and were thereunder entitled to Grade GS-905-14, as Trial Attorney (Contract).

4. Plaintiffs pursued the administrative remedy open to them by duly requesting that their positions be properly reclassified as Trial Attorneys at Grade GS-905-14 by the Office of Civilian Personnel, Defense Personnel Support Center, which was refused May 8, 1970; by the Director, Philadelphia Region, United States Civil Service Commission, which was refused July 20, 1970, and on reconsideration refused November 13, 1970; by the Classification Appeals Office, Bureau of Personnel Management Evaluation, United States Civil Service Commission, which was refused February 23, 1971; and by the Commissioners of the United States Civil Service Commission, which was refused July 14, 1971.

5. The aforesaid action of such Office of Civilian Personnel, and of such United States Civil Service Commission, was contrary to the provisions of General Attorney Series GS-905-0, was arbitrary and capricious and opposed to and not supported by substantial evidence.

6. On June 22, 1970, Wright-Patterson Air Force Base, Ohio, issued Announcement No. L-3 (1970) for Trial Attorney (Contract), GS-905-14 $19,643 per annum) furnishing Description of Work as follows:

The primary function of the incumbent is to prepare and try appeals involving contract disputes before the Armed Services Board of Contract Appeals. The duties of this position include: (1) Examining, reviewing and studying all correspondence, contractual documents, and other pertinent documentary evidence as well as reviewing all applicable laws, regulations and directives; (2) preparing legal opinions, all necessary written pleadings including Answers, Motions, Briefs and such other legal papers as required in each case; (3) interviewing and corresponding with witnesses including official or technical experts; (4) arranging and taking of depositions of witnesses with opposing counsel, including prepara-

tion of Interrogatories and Cross-interrogatories to be propounded to such witnesses; (5) arranging for hearing dates with opposing counsel and for the presence of all Government witnesses at such hearings; (6) planning and developing trial techniques, legal tactics and procedures to be used in the trial of each assigned case; (7) examination and cross-examination of witness and introduction of evidence during the course of adversary proceedings; (8) participating in negotiations and settlement of cases.

7. The duties and responsibilities of plaintiffs are identical to the duties and responsibilities of the Trial Attorneys of the Contract Appeals Division of the Office of the Staff Judge Advocate, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, who have been classified by the United States Civil Service Commission under General Attorney Series GS-905-0, at Grade GS-905-14. Both Trial Attorney positions call for identical practice before the Armed Services Board of Contract Appeals.

8. On September 16, 1971 plaintiffs brought action in the United States District Court for the Eastern District of Pennsylvania against the Members of the United States Civil Service Commission; the Secretary of Defense; the Commanding Officer and the Director, Office of Civilian Personnel, Defense Personnel Support Center; and against The United States; seeking declaratory judgment, mandamus, and money judgment. On March 21, 1972 such action was discontinued by plaintiffs, without prejudice, upon the consent of the United States Attorney and approval of the United States District Court for the Eastern District of Pennsylvania.

9. Plaintiff Herman R. Testan, presently classified GS-905-13-7, would, on reclassification as GS-14, be entitled to be reclassified as GS-905-14-4. Plaintiff Francis L. Zarrilli, presently classified GS-905-13-6, would, on reclassification as GS-14, be entitled to be reclassified as GS-905-14-3.

10. Plaintiff Herman R. Testan is entitled to recover from defendant the difference between his salary as Trial



Attorney (Contract) GS-905-13-7 and GS-905-14-4 since May 8, 1970. Plaintiff Francis L. Zarrilli is entitled to recover from defendant the difference between his salary as Trial Attorney (Contract) GS-905-13-6 and GS-905-14-3 since May 8, 1970.

Wherefore, each plaintiff claims of defendant the sum due him to date of judgment, and such other relief as your Honorable Court may deem just and equitable.

Respectfully submitted,

/s/ Edwin J. McDermott
EDWIN J. MCDERMOTT
Attorney for Plaintiffs
2425 Fidelity Building
123 S. Broad Street
Philadelphia, Pa. 19109

IN THE UNITED STATES COURT OF APPEALS

No. 128-72

[Filed May 30, 1972, Court of Claims]

HERMAN R. TESTAN and FRANCIS L. ZARRILLI,
PLAINTIFFS

*v.*

THE UNITED STATES, DEFENDANT

DEFENDANT'S ANSWER

Defendant, for its answer to the petition filed herein:

1 to 2, inclusive. Admits the allegations contained in paragraphs 1 to 2, inclusive, of the petition.

By way of further answer, defendant alleges that the Position Description referred to in paragraph 2 of the petition speaks for itself and is the best evidence of its contents.

3. Admits the allegations contained in the first sentence of paragraph 3 of the petition.

Admits that plaintiffs' duties, according to the provisions of said General Attorney Series GS-905-0, are properly evaluated as falling within Level D under the factor: *level of responsibility;* but otherwise denies the allegations contained in the second sentence of paragraph 3 of the petition.

4. Admits the allegations contained in paragraph 4 of the petition.

5. Denies the allegations contained in paragraph 5 of the petition.

6. Admits the allegations contained in paragraph 6 of the petition.



By way of further answer, defendant alleges that Job Announcement No. L-3 speaks for itself and is the best evidence of its contents.

7. Denies the allegations contained in paragraph 7 of the petition.

8. Admits the allegations contained in paragraph 8 of the petition.

9. The allegations contained in paragraph 9 of the petition constitute conclusions of law to which defendant is not required to answer, but to the extent that they may be deemed to be allegations of material fact, they are denied.

10. Denies the allegations contained in paragraph 10 of the petition.

11. Defendant specifically denies that plaintiffs are entitled to recover judgments against defendant in any amounts.

12. Except as herein admitted, denied or qualified, denies all allegations of material fact contained in the petition.

WHEREFORE, defendant prays that plaintiffs' petition be dismissed, and that defendant be granted such other and further relief as may be just and proper.

/s/ Harlington Wood, Jr.
HARLINGTON WOOD, JR.
Acting Assistant
Attorney General
Civil Division

/s/ LeRoy Southmayd, Jr.
LEROY SOUTHMAYD, JR.
Attorney, Civil Division
Department of Justice.

## GENERAL ATTORNEY SERIES

[Filed June 27, 1972, Court of Claims]

This series includes professional legal positions involved in preparing cases for trial and/or the trial of cases before a court or an administrative body or persons having quasi-judicial power; rendering legal advice and services with respect to questions, regulations, practices, or other matters falling within the purview of a Gederal Government agency (this may include conducting investigations to obtain evidentiary data); preparing interpretative and administrative orders, rules, or regulations to give effect to the provisions of governing status or other requirements of law; drafting, negotiating, or examining contracts or other legal documents required by the agency's activities; drafting, preparing formal comments, or otherwise making substantive recommendations with respect to proposed legislation; editing and preparing for publication statutes enacted by Congress and opinions or decisions of a court, commission, or board; and drafting and reviewing decisions for consideration and adoption by agency officials. Included also are positions, not covered by the Administrative Procedure Act, involved in hearing cases arising under contracts or under the regulations of a Federal Government agency when such regulations have the effect of law, and rendering decisions or making recommendations for disposition of such cases. The work of this series requires admission of the bar.

The following series and any standards published for these series are canceled and superseded by this standard:

(1) Trial Attorney Series, GS-910-0
(2) Attorney Trial-Examining Series, GS-940-0
(3) Naturalization Examiner Series, GS-943-0
(4) Judicial Series, GS-944-0
(5) Legal Administration Series, GS-950-0
(6) Attorney-Adviser Series, GS-970-0
(7) Legislative Attorney Series, GS-975-0



(8) Attorney-Editor Series, GS-980-0
(9) General Attorney Series, GS-985-0
(10) Trade-Mark Trial and Appeal Series, GS-1242-0

### TITLES

Attorneys tend to specialize in two respects. They may specialize as to the function they perform and the subject-matter area in which they work.

Titles are provided below which apply to the various functional and subject-matter specializations. The title of an attorney position is constructed by using the appropriate functional designation such as "Attorney-Adviser," followed by the appropriate subject-matter designation such as "(Contract)"—thus the complete title would be Attorney-Adviser (Contract).

There is one exception to the foregoing titling procedure which applies to positions classified in grade GS-9. At these lower grades specialization is usually relatively insignificant. The attorney is learning the procedures and policies of his organization. Not until he reaches the GS-11 level are his specialized knowledges and skills significant enough to be recognized in the title of his position. Accordingly, positions classified in GS-9 are titled "General Attorney" with no further designation.

*Functional titles:*

1. *Trial Attorney* for positions involved in the preparation for trial and/or the trial of cases, or for positions involved in providing technical guidance to persons preparing for or trying cases before a court or an administrative body or person having quasi-judicial power.

2. *Attorney-Adviser* for positions involved in rendering legal advice and services with respect to questions, regulations, practices, or other matters falling within the purview of a Federal Government agency (this may include conducting investigation to obtain evidentiary data and recommending an agency course of action); preparing interpretative and administrative orders, rules, or regulations to give effect to the provisions of governing

statutes or other requirements of law; drafting, negotiating, or examining contracts or other legal documents required by the agency's activities; drafting, preparing formal comments, or otherwise making substantive recommendations with respect to proposed legislation; editing and preparing for publication statutes enacted by Congress and opinions or decisions of a court, commission, or board; drafting and reviewing decisions for consideration and adoption by agency officials.

3. *Attorney-Examiner* for positions, not covered by the Administrative Procedure Act, involved in hearing cases arising under contract or under the regulations of a Federal Government agency when such regulations have the effect of law, and rendering decisions or making recommendations for disposition of such cases.

4. *General Attorney* for positions involving two or more of the above functional areas *or* for positions, regardless of functional or subject-matter area of work, classifiable at GS-9.

*Subject-matter titles:*

1. *(Admiralty).* Martitime law and matters related thereto.

2. *(Aeronautics).* Law pertaining to the operation of aircraft and related matters.

3. *(Antitrust).* Pertaining to antitrust and kindred law and protection of the competitive enterprise system.

4. *(Civil Rights).* Pertaining to law employed to protect federally secured civil rights and liberties of persons. Also pertaining to law concerning the conduct of elections and to labor practices which have relationship to the civil rights of individuals.

5. *(Contract).* The preparation, negotiation, review, and advisory work pertaining to contracts, agreements, bonds, notes, and other legal instruments.

6. *(Customs).* Pertaining to customs law and related matters.

7. *(Finance).* Corporation finance matters dealing with securities, reorganizations, recapitalizations, mergers, and other related activities or municipal finance mat-



ters involving municipal securities, tax levies, mortgage financing, loans and guarantees to municipalities or local public agencies.

8. *(General).* For areas of law not covered by other subject-matter titles or when two or more areas of law are involved.* Where this designation would appropriately be used with the functional title *General Attorney*, the subject-matter title *(General) may be omitted* to avoid the awkward combination—General Attorney (General).*

9. *(Immigration).* Pertaining to law concerned with the admission of aliens to, and their status in, the United States, as well as their exclusion or deportation from the United States.

10. *(Indian Matters).* Pertaining to Indian tribal claims and related matters.

11. *(International.)* Pertaining to law, agreements, treaties, conferences, and related matters of an international nature.

12. *(Labor).* Pertaining to Federal labor law and related matters.

13. *(Mail).* Pertaining to mail law involving mailability, fraud, claims, and other related matters.

14. *(Military).* Pertaining to military law and practice and to statutes and regulations concerning military personnel, including pay, allowances, appointments, promotions, separations, retirement, punishments, and other related matters.

15. *(Nationality).* Pertaining to law concerned with allegiance to a government and entitlement to protection from that government, and including such matters as reparations, naturalization, and citizenship.

16. *(Public Utilities).* Pertaining to law and regulations concerning the Government as an owner, consumer, or regulator of public utilities.

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These pages are to be substituted for pages 3 and 4 of the position classification standards for the GS-905 series, issued in October, 1959. The purpose of the substitution is to permit the omission of the subject-matter title "(General)" where it occurs in combination with the functional title "General Attorney."

17. *(Real Property).* Pertaining to title searches and other professional legal work in connection with all forms of real property (including natural resources) acquisition, use, or disposal.

18. *(Tax).* Pertaining to Federal tax law and related matters.

19. *(Trade-Mark).* Pertaining to the adjudication of trade-mark appeals.

20. *(Trade Regulations).* Pertaining to law prescribing unfair and deceptive acts and practices in interstate commerce, unfair methods of competition, and other monopolistic and trade restraining practices.

21. *(Transportation).* Pertaining to finance, rates, practices, operating rights, and other matters concerning motor, sail, water, or air carriers, freight forwarders, pipelines, or brokers of transportation.

22. *(Veterans).* Pertaining to law concerning veterans' rights and benefits and related matters.

Two other parenthetical titles which may be used when the qualification requirements of a position are significant enough to require their use are: (1) (Legislation) and (2) (Editor). These titles may be used in conjunction with any of the above subject-matter titles when necessary, e.g., (Tax-Legislation) or (Tax-Editor).

## EVALUATION PLAN FOR NONSUPERVISORY GENERAL ATTORNEY POSITIONS

There are a number of elements which together determine the difficulty and responsibility of attorney positions. These elements fall into two main categories (or factors): (1) *nature of the case or legal problem* and (2) *level of responsibility.* While there is some relationship between these two factors, each one is measured separately to recognize the fact that they do not necessarily appear in attorney positions in proportionate degrees. For example, an attorney may be involved in a high-level legal case or problem, but his degree of responsibility may be limited. Conversely an attorney may be involved in a relatively routine legal case or problem, but he may be operating with a high degree of responsibility.



The level assigned to one factor together with the level assigned to the other factor will determine the grade of the position according to the conversion table at the end of the standard.

• • • •

(1) *Nature of the case or legal problem.* This factor incorporates all those elements in a case or a problem which tend to make it more or less difficult to resolve satisfactorily. These elements measure the inherent difficulty of the legal and factual questions involved in a case or problem, as distinguished from the nature or extent of the individual's responsibilities for resolving the problem, the supervision he receives, extent of significant personal contacts, or any other performance element.

Among the elements are such things as the *complexity of legal and factual issues.* This element is obviously a key one, i.e., the more complex the legal or factual issues —the more difficult the resolution of the case. A by-product of a complex legal or factual issue is often the negotiation and preparation of a complex contract or other legal document.

The *impact of the case or problem* (in economic, social, or political terms) on the public, on relations with State or local governments, on national defense, on foreign relations, on private interests, or on agency authority, operations, procedures, or practices, is also an important consideration in evaluating the nature of the case or legal problem. When a legal matter materially affects any of the foregoing the consequences of the legal advice or decision may be far reaching and the damage which can be inflicted on the parties concerned or on the Government's prestige is often irreparable.

The *importance of the case or legal action as legal or administrative precedent* is very significant. In the vast area of administrative law, agency actions cumulatively reflect policies and trends. When a precedent-setting situation arises it can easily undo something which has taken years to attain. Often a relatively uncomplicated situation can become a test case of extreme importance

to a Government agency or non-Government interested groups. Precedent-making cases or actions make for responsible legal endeavor whether or not large amounts of money or complex legal or factual issues are involved. To measure the significance of a precedent case or action it is necessary to consider it in relation to the significance of its consequences. Consideration of the precedent in terms of the element, *impact of the case or problem* (in economic, social, or political terms), is required.

The *nature of the competition* encountered may be significant. Just as in an athletic event, the tougher the competition—the tougher the contest. Usually, tough competition is an indication that something important is at stake—whether it be money, a precedent in the making, or some other important consideration.

The *nature and availability of precedent decisions* is another important constituent of the factor, *nature of the case or legal problem.* If precedents are clear cut and plentiful, the attorney's job is ordinarily relatively simple. When precedents are few or conflicting, his job is more difficult.

Occasionally the *delicateness of the problem* becomes an all-important consideration in evaluating the nature of the case or legal problem. What might ordinarily be an uncomplicated legal or factual situation, with no foreseeable precedent-setting value, may develop into a very delicate matter which could possibly embarrass public officials or the government in the eyes of officials of a foreign government.

*Public interest* in a particular legal matter has an effect on the nature of the case or legal problem as does the delicateness element. No matter how routine a situation may be, it becomes a difficult one to resolve when public interest is great.

*Money* is another element which may have a significant effect on certain legal cases or problems. The review, preparation, and negotiation of contracts and other legal documents, the conduct of hearings and trials, the giving of advice to administrators, the review and preparation of drafts of legislation, and any other attorney



endeavor will generally require special care and attention when a large amount of money is involved, unless the case or problem is otherwise routine (e.g., review of a standard form contract). Also, not all legal matters involve money nor can they be equated to money terms. Such matters are evaluated in light of other elements.

* * * *

These elements are not independent of one another. For example, the economic, political, or social impact of a case cannot be considered apart from its importance as a legal or administrative precedent. If a case is precedent setting, its impact in any of these terms is compounded. Likewise, a case that involves a considerable amount of money or materially affects a significant segment of private and public interests is apt to be strongly contested or negotiated by highly competent legal counsel. On the other hand, less emphasis ordinarily should be given to these elements of impact when the legal questions are clearly drawn and covered by clearly applicable precedents. Therefore, the interrelationship of these elements must be considered in evaluating the nature of the case or legal problem.

* * * *

Many (if not most) attorneys are engaged in the business of *preventing* litigation or other legal problems from developing, rather than resolving them once they have developed. In these situations, such elements as impact or public interest are not as apparent as they would have been had a problem arisen. However, positions involved in preventive legal work are credited similarly to those positions involved in resolving the problems, i.e., those elements of the nature of the case or legal problem which are not manifest, as a result of the preventive action, should be credited as they would have been if the situation had attained major proportions.

* * * *

Unless the word "case" can be seen from the content to mean formal litigation, the words "case" and "legal problem" are used herein in their generic sense and en-

compass any legal assignment performed by an attorney whether it be of a formal or informal nature.

* * * *

(2) *Level of responsibility*—This factor incorporates all those elements which are indicative of the level at which an attorney carries out his assignment. The factor includes the functions performed, the supervision and guidance received, the personal work contacts, and the nature and scope of recommendations and decisions.

The level of *functions* performed provides perspective to the level of responsibility factor. It reflects the maturity level of the attorney's endeavors in terms of what he does in connection with a case or legal problem. This element includes functions involved in trial, advisory, hearing, and legislative work. Each of these functions has parallel types of responsibilities, contacts, recommendations, and decisions depicted at the various intensity levels of this factor.

In some instances an attorney may lay the groundwork for presentation of the Government's case, but the actual trial is conducted by another attorney. In determining the level of trial work represented by the attorney who prepared the case, the extent of his participation is weighed. If he lays the complete groundwork for the Government's case, his position is credited as it would have been had he personally tried the case. In short, trying a case is not inherently more difficult than preparing the same case for trial or vice versa.

Many Justice Department attorneys (and attorneys in other agencies responsible for the conduct of litigation in Federal courts) are responsible for considering, among other things, whether a matter is of sufficient importance to warrant prosecution; whether there is adequate evidence; and whether prosecution is likely to affect adversely other cases which may have originated in different agencies and are pending decision by the courts. These are considerations which can be credited only to the Justice Department attorney positions and to attorney positions in other agencies responsible for the conduct of litigation in Federal courts.



*Supervision and guidance received* is another element necessary in evaluating the attorney's level of responsibility. With more or less supervision and guidance the attorney's responsibilities decrease or increase as the case may be. The attorney who is given a problem to resolve with no accompanying instructions obviously has a greater degree of responsibility than another attorney who is given a similar problem with detailed instruction as to what to do and how to do it.

The *personal work contacts* element is another reflector of the attorney's level of responsibility. Other things being equal, the more important his contacts—the greater his responsibilities. For example, an attorney who presents his agency's view to a congressional committee has a greater degree of responsibility than an attorney who presents a similar explanation to his counterpart attorney in another agency. Many attorneys, however, while performing very difficult and important work, do not have need to contact persons other than their immediate associates. Positions of attorneys performing these noncontact functions are not to be penalized if they have the other characteristics of a particular level of responsibility.

The *nature and scope of recommendations and decisions* is again an element which indicates the level of an attorney's responsibility. The more important and authoritative his recommendations and decisions—the greater his degree of responsibility. An attorney rendering substantive advice on the terms of a contract has a greater degree of responsibility than an attorney reviewing the same contract for legal sufficiency and inclusiveness of the language.

* * * *

Three levels of intensity are described for each of the two basic factors. With respect to factor 1, nature of the case or legal problem, the three levels describe what could be classed *simple*, *difficult*, and *most difficult* cases or legal problems. These levels are intended to cover the full range of cases or problems. If a case or problem does not satisfy the requirements indicated for the level of one of the types, it is identified with the next lower

type because each type is described in terms of the minimum characteristics of the range of difficulty it represents.

The three ranges of difficulty or importance for nature of the case or legal problem represent the span of difficulty or importance of attorney work throughout the Federal Government. They are *not* intended to represent a span of difficulty or importance of attorney work found in every agency. Some agencies will not have cases or legal problems of the nature described in the third range.

With respect to factor 2, level of responsibility, the three levels cover what may be described as the *beginning*, the *intermediate*, and the *senior* attorney levels. The levels are labeled (A), (C), and (E), in recognition of the fact that there are positions that fall between these (described) levels. These intervening levels are represented by omitted letters (B) and (D). Unlike the levels described for nature of the case or legal problem, which are described in terms of minimum characteristics, these levels are described in terms of *typical* characteristics. Accordingly the intervening level (B) is appropriate when, for example, a position *compares with* level (A) in some respects and level (C) in others. The intervening level is also appropriate when a position *falls clearly between* two of the levels described with respect to the majority of elements. Unlike the type III level of factor 1, level E is not intended to be inclusive of the highest level of responsibility of nonsupervisory attorney positions.

The grade of an attorney position is determined on the basis of the combination of the highest factor levels which are representative of the position to a significant extent.

A grade-level conversion chart is provided showing how combinations of the two factors (*nature of the case or legal problem and level of responsibility*) convert to grade levels. The conversion chart includes the intervening levels (B) and (D), as well as the described levels (A), (C), and (E), for the *level of responsibility* factor.



## THE EFFECT OF INDIVIDUAL STATURE IN THE PROFESSION

From time to time incumbents of professional legal positions are encountered who have achieved outstanding stature in their particular area of law (i.e., admiralty, labor, tax, and general law), so that their opinions are generally recognized by other attorneys as especially authoritative and are sought after and given special weight. Normally attorneys are not in a position to accomplish something of enduring significance until they have matured in the profession and progressed in the organization to a point where their actions have a significant influence on the agency's program. Accordingly, this factor, except in unusual circumstances, is applicable to GS-13 positions and above.

Individuals who have achieved this outstanding stature bring a plus element to the performance of the assigned duties of their positions, which cannot always be fully evaluated in terms of the criteria spelled out in the body of the standard. In such cases it is appropriate to identify the nature of this peculiar stature and to provide some credit for it in evaluating the position. This extra credit will not normally, in itself, be worth an additional "bonus" grade. However, in evaluating positions which meet the requirements of a *level of responsibility* with respect to some elements of evaluation and fall short with respect to other elements, this effect of the individual on the position should be recognized in evaluating it to the higher responsibility level, which in some cases will make a difference of one grade in the conversion to grade level.

Stature in the legal profession is usually attained through accomplishments of enduring significance. For example, should an attorney write a treatise on a particular area of law related to his work, and subsequently become recognized by attorneys and management officials as an expert in this particular area, he has attained stature in his area of law. Also an attorney may become so well versed in his subject-matter field that he becomes the "oracle" *in his organization on that subject.* If the

individual has brought something to the position which cannot be replaced if he subsequently resigns, this too may be an indication of stature. The fact that management would not fill a given position upon the incumbent's resignation without first diluting the duties and responsibilities of the position is evidence that the current incumbent has outstanding stature.

An attorney may have brought attention to himself by having once pursued an extremely difficult legal problem to a successful conclusion. Subsequently, management has looked to him for the continued highly competent handling of matters which it considers of the utmost importance. Stature is attained this way also. Generally this situation is manifest by the assignment of more difficult duties and responsibilities to the individual. However, because of unusual workload situations the incumbent may on occasion be assigned cases or legal problems not of his traditional level of difficulty. This does not preclude the continued recognition of stature. Stature is not something that rises and falls with each project —rather it is a cumulative attainment.

Since stature is relative to the duties and responsibilities of the position, the breadth of the stature may be either local, regional, or national.

The stature of an individual is an attainment for management officials to identify.

## THE USE OF EXAMPLES TO ILLUSTRATE LEVELS

In the description of levels for the two factors, in some instances, illustrative examples of difficulty and responsibility are included. These examples are illustrative only and are not intended to be all inclusive. They are to be used only as guides in classifying attorney positions. In other words, the absence, from a given level, of a specific example, does not preclude the use of that level (if it is otherwise appropriate) in the evaluation of a position.



## VARIETY

Variety has not been used as a separate element in this standard, since many attorney positions are inherently varied. In smaller organizations particularly, attorney positions may encompass a range of subjects and activities. Accordingly, at the various degree levels of the standard, work examples are cited which are illustrative of positions involving variety.

### 1. *NATURE OF CASES OR LEGAL PROBLEMS*

*Type I*

Legal work of this type is characterized by the following features:

(1) The legal question or factual situation can be relatively easily resolved in the light of the well-established or easily determinable facts and clearly applicable precedents involved.

(2) The impact of cases or legal problems is local, or limited to the parties directly concerned (private individuals or a local industry) since legal or administrative sanctions, fines, or penalties are relatively minor and involve no new precedents of wider potential impact.

(3) Relatively limited sums of money are involved (e.g., a few thousand dollars). The cases have no widespread social or political impact. For example, where industry practices are involved no major effect on the industry can result from the decision. There is limited public interest in the case or legal problems.

*Type II*

Legal work of this type is characterized by *one* or more of the following features:

(1) Difficult legal or factual questions are involved because of the absence of clearly applicable precedents due to the newness of the program or the novelty of the issue; or it is highly arguable which precedents are applicable to the case at issue because of the complexity of the facts or the different possible constructions which may be placed on either the facts or the laws and precedents involved.

(2) The impact of the case or legal problem affects, economically, socially, or politically, either directly or as a legal or administrative precedent, a significant segment of private or public interests (e.g., a large corporation, a large labor group, the residents of a large geographical region of the United States as in a large public works project, a large grant-in-aid program, a nationally organized professional group, the producers of a given farm commodity, the manufactures of a given product, a class of Government contractors, i.e., suppliers of a particular service or product, or an important program of a Government agency). Also included in this type are cases or legal problems which have an impact on relations between the United States and foreign governments (e.g., acts by servicemen or other representatives of the United States stationed abroad, questions such as whether or not to buy foreign or American products, or negotiating and drafting consular conventions) and which must be handled with great care.

(3) Large sums of money are directly or indirectly involved (e.g., about one hundred thousand dollars), or there is considerable interest from a significant segment of the population (see paragraph 2 above),



or the case is strongly contested in formal hearings or informal negotiations by the private individuals, corporations, or Government agencies involved.

*Type III*

Legal work at this level is characterized by *one* or more of the following features:

(1) Extremely complex and difficult legal questions or factual issues are involved in the drafting, interpretation, or application of legislation, regulations, contracts, orders, decisions, opinions, or other legal instruments and require for their solution a high order of original and creative legal endeavor in order to obtain a reasonable balance of conflicting interests (e.g., legal work involved with balancing the requirements of national security with individual liberties, determining the legality of State and local taxation of the use of Federal Government property by private business firms, recommending or making policy concerning consent decrees in antitrust litigation, or legal work involved in developing material for Executive orders concerning the use of Federal troops in a domestic emergency); or complex factual or policy issues are involved requiring extensive research, analysis, and obtaining and evaluating of expert testimony or information in controversial areas of scientific, financial, corporate, medical, engineering, or other highly technical areas.

(2) The case or problem is such that it can have the effect of substantially broadening or restricting the activities of an agency (e.g., the enforcement of antitrust and trade regulations, tax laws, food and

drug laws, or the laws governing securities transactions); or it has an important impact on a major industry whose economic position affects the health and stability of the general economy (e.g., a merger or reorganization involving a basic industry, or on the rates, practices, or competitive position of a major industry, for example, the position of the railroads in relation to the motor carriers based on the "reasonableness" of their respective rates, or the position of domestic airlines operating overseas in relation to restrictions on foreign airlines operation in this country). It has an important impact on major private or public interest (e.g., a substantial broadening or restriction of benefits to veterans under the law, amounting to many millions of dollars annually, or a major extension or revision in a State and/or other grant program or a nationwide retirement system, the development of administrative regulations of such scope as the Armed Services Procurement Regulation, a substantial question of civil rights involving the due process clause, or a statement defining the legal rights of the Four Powers with respect to Berlin). Also included in this type are problems of unusual delicacy, such as fraud cases, because of the serious consequence of error and the great burden of proof assumed by the Government.

(3) Cases or problems of this type frequently involve, directly or indirectly, very large sums of money (e.g., about a million dollars) and/or they are frequently vigorously contested by extremely capable legal talent (e.g., a major antitrust case). Interest in these cases is generally nationwide.



## 2. *LEVEL OF RESPONSIBILITY*

### *Level A*

*Nature of functions*

This level is characterized by functions, examples of which are listed below.

Searches case reports, legal documents, periodicals, and textbooks; and prepares tentative drafts of letters, memoranda, and legal documents for use by higher-grade attorneys in the preparation of opinions, legislative reports, briefs, contracts, and other papers or legal documents (i.e., particular points of law as decided in previous cases; background information and legal references as a basis for advising on management plans and policies, compilation of legal issues and legislative history in connection with pending legislation).

Assists the attorney in charge of a court case or an administrative proceeding by interviewing and selecting appropriate witnesses, preparing them to give testimony, conducting direct examination, suggesting questions to be asked in cross-examination, cross-examining witnesses after the line of questioning has been settled, and drafting findings of fact, conclusions-of-law, and orders based upon the record.

Prepares cases for filing by drafting complaint, order to show cause, indictment, preliminary motions, and supporting affidavits and briefs.

Prepares drafts of pleadings, motions, and interrogatories in connection with cases in litigation.

Conducts investigations of limited scope to obtain facts, studies legal precedents, and prepares recommendations for review of a supervisor.

*Supervision and guidance received*

Legal research is performed in accordance with preliminary instructions as to methods of approach, source material available, and policy and precedent of the office.

Participation in hearings is limited to examination or cross-examination where the line of questioning has been

carefully laid down by the attorney in charge of the case and where the issues with respect to the points to which the particular witness is expected to testify are well defined and narrow in scope.

Completed written work is thoroughly reviewed usually by an attorney of higher grade who points out errors, omissions, and inadequacies, and corrects or directs the incumbent to correct them.

*Personal work contacts*

Personal work contacts constitute a relatively minor element at this level. The most important contacts are those involved in fact gathering. Contacts initiated by the incumbent are principally in obtaining information and/or legal references pertinent to the problem under study, and interviewing prospective witnesses, claimants, or other persons having knowledge of the facts involved in the problem or the case. As experience is gained, may advise agency personnel on minor matters or may participate in hearings or trials through examining witnesses along lines of inquiry laid down by an attorney of higher grade level.

Attendance at conferences with representatives of other agencies, industry, State and local governments, higher administrative officials, or congressional committees and their staffs is largely as an observer to gain experience.

*Nature and scope of recommendations and decisions*

The incumbents are responsible for the accuracy of factual information and legal citations, which are incorporated in the decisions, opinions, briefs, and other legal documents prepared by attorneys of higher grade level. Legal opinions, analyses, and conclusions ordinarily are not expected to be in finished form (except for relatively routine legal correspondence).



*Level C*

*Nature of functions*

This level is characterized by functions, examples of which are listed below.

Conducting legal research in connection with:

(1) Cases pending administrative hearings, trial before courts of original jurisdiction, or argument in appellate courts.
(2) Legal questions referred by administrative officials of the employing agency, such as questions concerning the interpretation and application of statutes, rules, and regulations as they pertain to contracts, claims, or other legal instruments involving private business, State, local, national, or foreign matters.
(3) Questions regarding the effects of provisions of proposed legislation or proposed changes in agency policies or regulations.

Where further development of facts is needed, refers question back to originating organization, to the operating organization affected by a proposal, or to the investigating arm of the employing agency, indicating the precise nature of information required. In criminal cases may recommend a grand jury investigation.

In some situations, personally conducts research or investigation of the facts as well as the laws regulations, and legal precedents. Such research or investigation may involve any of the following:

(1) Analyzing the factual and legal issues presented to determine what further facts are needed and what legal sources are applicable.
(2) Reviewing policies, procedures, regulations, technical manuals, and other agency publications.
(3) Studying industry and trade practices; policies, procedures, and operations of other Government agencies or of the States or local bodies; or business, technical, and professional publications and other authoritative sources of information required in the technical interpretation of factual issues.

(4) Conducting research of laws, legal opinions, policies, regulations, legal texts, and precedent cases bearing on the legal issues involved in the problem, proposal, or case.
(5) Conducting pretrial examination of witnesses, or —in the performance of advisory services or legislative review—interviewing operating officials, industry spokesmen, and other interested persons to complete the background investigation.
(6) Preparing memoranda or reports outlining the facts and legal issues, analyzing the factual and legal issues involved, explaining the application of legal principles and precedents, and justifying recommendations or conclusions.

On the basis of the research or investigation, prepares necessary legal documents, advisory opinions for administrative personnel, drafts or comments on proposed legislation or changes in regulations, or recommendations on the advisability of instituting a civil or criminal suit, an administrative hearing, or other disposition.

When litigation is undertaken, prepares and/or presents, or provides technical guidance during, the prosecution of the Government's or the agency's case in an administrative hearing, before a court of original jurisdiction or appellate court. Prepares charges, show cause orders, complaints, briefs, motions, and other documents preparatory or incident to the trial of the case.

Participates in pretrial or prehearing conference, examines and cross-examines witnesses, argues motions before the court or hearing officer, and summarizes the Government's or the agency's case.

When the activities of the agency require entering into contractual relations, negotiates (usually as a member of a team) with the representatives of private business or of State, local or foreign governments, and drafts the necessary contracts and other legal documents.

Examines formal filings for legal sufficiency and full disclosure required to be made by statutes, rules, and regulations. Conducts or participates in conferences with legal counsel of registrant, or reviews opinions of counsel



as to meeting filing requirements. Conducts any investigation and any subsequent administrative proceedings in connection with such matters.

Some of the functions enumerated above may be delegated to attorneys of lower grade level, who work under the guidance of the incumbent.

Also characteristic of this level are such duties as examining petitioners, claimants, and defendants against charges brought under the administrative regulations of an agency; and preparing reports, exhibits, and legal memoranda from the records and hearings, outlining the factual and legal issues and the recommendation for disposition of the case for the consideration of quasi-judicial officers or bodies, or the courts.

Acts regularly as the legal adviser on the plans and operations of a single program or activity, characterized usually as a distinct entity with separate, identifiable operations, authorized by law to accomplish a specific purpose (e.g., child health, school assistance in federally affected areas, interstate quarantine) but included in a group of related programs. May also serve as the assigned specialist on a single program or a major phase of several related programs or major activities.

Reviews for legal soundness and accuracy program material emanating from operating units of the organization.

In cases of sufficient scope and complexity to require the services of a staff of several attorneys or other specialists to present the Government's case or position, has responsibility for conducting *a phase* of the trial or other type legal problem under the guidance of the attorney in charge.

*Supervision and guidance received*

Incumbents of positions at this level of performance are expected independently to plan, organize, and conduct studies of the mill run of legal problems, cases, or legislative proposals encountered in their respective programs. They are apprised of any unusual circumstances surrounding the case or the problem, any back-

ground information which must be considered, and any important policy considerations that will govern development of the case or the solution.

Beyond this, they normally work independently in investigating the facts, searching legal precedents, defining the legal and factual issues, drafting the necessary legal documents, and developing conclusions and recommendations.

Completed work is normally assumed to be accurate with respect to legal citations, treatment of facts, and other aspects of technical treatment. However, all written work is subject to review for soundness of approach and argument, application of legal principles, and consistency with governing policies, procedures, and regulations of the employing agency.

Before a case is presented in an administrative hearing or before a court, the supervisor discusses the presentation, the line of approach, the possible lines of opposition to be encountered, and other aspects of the case to insure that proper groundwork has been laid for successful prosecution of the case.

*Personal work contacts*

Generally, personal work contacts are an important characteristic of this level. Effectiveness is required in presentation, exposition, and argument in presenting cases to administrative hearings and to courts.

Attorneys participate in pretrial or prehearing conferences with industry representatives or private citizen claimants, defendants, or petitioners and their attorneys, explain points of law, charges, or qualifications of claimants, and refer suggested settlements or compromise offers to superiors with appropriate recommendations.

They advise negotiating officials in legal contractual matters by recommending appropriate clauses, provisions, and general wording.

Also characteristic of this level is participation in conferences with representatives of operating programs, State and local governments, industry, private organizations (e.g., veterans organizations, professional associations), or other Government agencies in developing or evaluating proposed changes in legislation or agency policies or regulations.



Incumbents participate in negotiations concerning conflicts in State and Federal regulations with State officials.

Incumbents assist the staffs of congressional committees in technical drafting of legislation.

*Nature and scope of recommendations and decisions*

Recommendations to those outside the agency or to administrative officials at higher levels are normally made through the supervisor. Examples of recommendations characteristic of this level include:

(1) Whether to initiate criminal or civil suits against alleged violators of Federal laws and regulations.
(2) Settlement of claims against the Government brought by private citizens.
(3) The organization, order of presentation, and line of argument to be used in the presentation of cases or hearings delegated to the incumbent as the trial attorney.
(4) Settlement of suits brought by the government against others (e.g., offers in compromise in income tax cases).
(5) Replies to requests for legal advice or interpretations of law arising out of the day-to-day operations of agency programs.
(6) Substantive changes in legislation and agency policies or regulations to make them more equitable, responsive to needs, or easier to administer.
(7) Whether to approve a contract or other legal document in its proposed form and content.

*Level E*

*Nature of functions*

This level is characterized by functions, examples of which are described below.

Reviews cases for agencies responsible for the conduct of litigation in Federal courts to determine whether to

recommend prosecution. Considers the weight of the evidence, the importance of the case, the necessity of uniform application of the law throughout the land, the cost of litigation, and other considerations which bear on the advisability of instituting suit. Prepares a memorandum of fact and law and recommends whether prosecution should be undertaken. Generally, the memorandum is submitted directly to the individual responsible for authorizing formal legal action. If prosecution is authorized, initiates the filing of papers with the appropriate court, prepares and tries the case, or prepares the case for trial by another attorney. If the case is assigned to another attorney for trial, may advise and assist him. This assistance may extend to active participation in the presentation of the case, preparing witnesses, examining and cross-examining witnesses, and consulting with the trial attorney with respect to the line of argument.

Reviews, for agencies responsible for appellate litigation, records of suits for or against the Government in which the decision was unfavorable to the Government to determine whether to recommend appeal to a higher court. Considers the effect of the decision as a precedent if allowed to stand, the weight of the evidence, the need for consistent application of the law in all jurisdictions, the amount of money involved, the cost of litigation, and other considerations bearing on the advisability of appeal. If appeal is recommended, and the recommendation approved, may prepare and/or present the Government's case before the appellate court.

Drafts legislation or prepares complete reports on changes in basic legislation. Drafts or receives proposed legislation and refers to organizations having jurisdictions over programs which would be affected by the proposed changes in law. Evaluates the proposed legislation in terms of its foreseeable effect on agency programs, policies, procedures, regulations, methods of operation, and extent of operation, and on existing legislation. This evaluation is based on an analysis of the comments of operating organizations, the incumbent's own program knowledge, his awareness of the legal implications of the proposed legislation, and his knowledge of related legislation. Similar functions are performed with respect to the formulation and/or coordination of treaties or other international agreements or of rules, regulations, or policies applicable to major programs of the agency.



At the highest level of drafting or reviewing proposed agency decisions, analyzes the records, including transcription of testimony and pleadings, evaluates facts, determines questions of law, and either recommends adoption of a decision prepared by another attorney or drafts his own decision for consideration and adoption by agency officials who exercise final authority in such matters. This does not preclude the use of this level for positions at subordinate organizational echelons if, in fact, the drafting or reviewing of proposed agency decisions at such echelons is independently done, is directly submitted (with no further technical review) to agency officials who exercise final authority, and is given weight and effect equal to the recommendations of incumbents of positions at the highest agency level of drafting or review.

Acts as principal attorney in charge of the preparation and presentation of cases before administrative tribunals or before the trial or appellate courts, where the cases (a) are of such scope that they may, in many instances, warrant the assistance of one or more attorneys of lower grade or other specialists and (b) are of such importance that they frequently involve matching professional skills against some of the most distinguished and highly paid legal talent in the country. The principal attorney exercises full responsibility for the development and presentation of the case.

Acts as principal attorney in charge of recommending the policies and developing the procedures and regulations implementing new or amended legislation (e.g., new or revised grant-in-aid programs) for the employing agency. Is responsible for insuring that these policies, procedures, and regulations are consistent with the intent of the law and are administratively sound, efficient, and economical in operation. In developing the details of operations considers the needs, desires, and attitudes of administrators, State and local officials, industry representatives, the general public, or others who may be affected by the new or revised program.

Acts as legal counsel to the head of a major operating program of the department or agency (e.g., a bureau, command, technical service, or regional office or field installation when the field installation has been delegated unusual authority or authority commonly of a higher echelon). Is responsible for advising on questions of law or administrative policy involved in the operations of the organization and in its contacts with industry, private and professional associations, State, local, or foreign government, or the general public. Advises on laws, regulations (including those who have the effect of law) of his own and other Federal agencies, opinions of the Comptroller General or the agency's general counsel, common law, administrative law, etc. Answers questions which are covered by interpretations of the Comptroller General or other legal authority. Is responsible for recognizing those questions which require an interpretation by such legal authority. Prepares recommended interpretation outlining the facts and the applicable law. Is responsible for developing the material which, in effect, becomes the agency's justification for the conduct of litigation on behalf of the agency by a litigating agency.

Sits as a quasi-judicial officer hearing cases involving claims against the Government, complaints, or requests for relief from the provisions of agency regulations which have the effect of law; conducting investigative hearings pursuant to statutory provisions to establish a formal written record; hearing charges brought by the Government against violators of provisions of law or regulations; or hearing cases arising under the disputes clause of a government contract. Renders decisions on the points of law or construction of fact in dispute and directs corrective action, payment of claim, or discretionary relief depending on the merits of the case and the penalties and permissible relief under law and regulations.

*Supervision and guidance received*

Attorneys at this level are expected to carry out any assignment within their area of responsibility without preliminary instruction. At the time an assignment is



made the supervisor may discuss the significance of the problem and give any background information received. From this point, the incumbent independently conducts the investigation or negotiation, plans the approach, and develops the completed decision, report, brief, opinion, contract, or other product; or represents the Government at the conference, hearing, or trial. Where a hearing or trial is involved, the supervisor may be briefed on the overall approach to be taken and the line of argument to be pursued, especially where an important precedent effect is anticipated or there is widespread public interest in the outcome. Completed work in the advisory or legislative and regulatory areas is reviewed before it is signed out for consistency with agency policy, for possible precedent effect, and for overall effectiveness.

*Personal work contacts*

This level is characterized by the most responsible personal contacts, examples of which include:

(1) Conferring or negotiating with top administrative personnel in the agency, private business, or State, local, or foreign governments on important legal and policy questions.
(2) Advising and assisting congressional committees and their staffs in drafting legislation or giving expert testimony before congressional hearings on legislative proposals.
(3) Trying cases before courts or administrative bodies.

*Nature and scope of recommendations and decisions*

Recommendations characteristic of this level are similar to those characteistic of level (C). The major difference is that at this level advice on the interpretation of law or on proposed changes in legislation, policy, and regulations is often given directly to heads of programs, bureau chiefs, cabinet officers, congressmen, or representatives of State and local governments. In some instances recommendations are made through supervisors, as at level (C), but these recommendations are usually tantamount to final decision. This is particularly pertinent to posi-

tions concerned with recommending whether to prosecute cases or to appeal adverse decisions in agencies responsible for litigation.

Incumbents are responsible for recognizing when the matter under discussion is of such precedent-setting nature or of such importance or delicacy that his advice must be cleared with superiors before it is given out.

Attorneys at this level often deal with matters of such scope and complexity that they require the concentrated efforts of several attorneys or other specialists. In such circumstances attorneys at this level are normally responsible for directing, coordinating, and reviewing the work of the team.

GRADE-LEVEL CONVERSION CHART

| *Nature of Cases or Legal Problems* | *Level of Responsibility* | *Grade* |
|---|---|---|
| TYPE I | A | * |
| | B | 9 |
| | C | 11 |
| | D | 12 |
| TYPE II | A | 9 |
| | B | 11 |
| | C | 12 |
| | D | 13 |
| | E | 14 |
| TYPE III | A | 11 |
| | B | 12 |
| | C | 13 |
| | D | 14 |
| | E | 15 |

* Assignments involving Type I cases or legal problems, and *A* level of responsibility, are not found in the Attorney profession. Where relatively clear-cut cases or problems are involved, the attorney who is assigned Type I cases typically operates at the B level of responsibility, or higher.

Persons who have graduated from law school but not yet passed the bar examination may be assigned clear-cut cases of Type I and work under close, step-by-step supervision as outlined in Level A. The grade of such positions would be GS-7. Such positions are classified in the Law Clerk Series, GS-904.



IN THE UNITED STATES COURT OF CLAIMS
TRIAL DIVISION

No. 128-72

(Filed September 14, 1973)

HERMAN R. TESTAN and FRANCIS L. ZARRILLI

*v.*

THE UNITED STATES

*Edwin J. McDermott*, attorney of record, for plaintiffs. *LeRoy Southmayd, Jr.*, with whom was *Assistant Attorney General Harlington Wood, Jr.*, for defendant.

OPINION*

SPECTOR, *Trial Judge*: The plaintiffs are Government lawyers currently and at all relevant times mentioned herein employed as trial attorneys, grade GS-905-13, in the Office of Counsel, Defense Personnel Support Center (DPSC), Defense Supply Agency (DSA), in Philadelphia, Pennsylvania. Through supply contracts with Government contractors, the DPSC procures and then distributes food, clothing, and medical supplies to the U.S. Army, Navy and Air Force, and to other nondefense agencies of the Federal Government. Plaintiffs' positions consist of representing the Government in appeals brought before the Armed Services Board of Contract Appeals

* The trial judge's recommended decision and conclusion of law are submitted in accordance with Rule 134(h).

(ASBCA) under the disputes article found in all Government contracts.

On December 9, 1969, Donnell K. Wolverton, Chief Attorney of the Office of Counsel, DPSC, submitted individual requests for personnel action to the Office of Civilian Personnel seeking reclassification of plaintiffs positions to grade GS-905-*14* In support of his request, Mr. Wolverton stated that plaintiffs' duties and responsibilities meet the requirements for the higher grade under the criteria contained in the General Attorney Series, GS-905-0, the applicable classification series published by the Civil Service Commission.

In addition, Mr. Wolverton stated that plaintiffs' positions were essentially the same as those of ASBCA trial attorneys in the Office of the Staff Judge Advocate, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base at Dayton, Ohio. The latter are classified GS-905-14. Data in support of his request was submitted both prior to and in response to a request for additional specific information.[1] After an audit, Regina B. Graham, a position classification specialist, concluded that plaintiff's assigned duties were properly classified at the GS-905-13 level. On May 8, 1970, the director of the Office of Civilian Personnel so ruled.[2]

Plaintiffs appealed this decision to the Civil Service Commission, Philadelphia Region, submitting voluminous material concerning their work load, responsibilities, types of cases and issue litigated, and lists of the dollar amounts in controversy. Their appeals were denied by the regional director on July 20, 1970.[3] Plaintiffs requested reconsideration shortly thereafter, and submitted supplementary data in support of their request. By letters of November 13, 1970, plaintiffs were informed that their requests were once again denied.[4]

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[1] *See* findings 7 through 10.

[2] *See* findings 11 and 12.

[3] *See* finding 14.

[4] *See* finding 16.



After correspondence and an interview with the Classification Appeals Office, plaintiffs, on January 17, 1971, formally requested the reopening and reconsideration of their appeals. On February 23, 1971, the regional Classification Appeals Office informed plaintiffs that the opinion remained unchanged.[5] On April 20, 1971, plaintiffs appealed to the Civil Service Commission. By letter of July 14, 1971, the assistant to the commissioners (appeals) notified plaintiffs that their request to reopen the case had been denied.[6] There can be no doubt that plaintiffs have diligently sought relief through appropriate administrative channels.

At each administrative level, as well as in the case filed in this court, two semantically separate but theoretically similar arguments have been advanced. In summary, the first of these is that plaintiffs' positions are independently entitled to classification GS-905-14 by application of the standards expressed in General Attorney Series GS-905-O. The second point is that plantiffs' positions are substantially identical to those held by trial attorneys employed at the Contract Appeals Division of the Office of the Staff Judge Advocate, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base. Dayton, Ohio (AFLC). By the same token, the administrative responses to these arguments have not varied.

As to the first argument, the uniform response has been that plaintiffs' positions were correctly classified under the standards expressed in the General Attorney Series. As to the second. it has been stated[7] that comparison with positions at other military services is not a proper manner of classification.

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[5] *See* finding 17.

[6] *See* finding 18.

[7] By the Regional Office of the Civil Service Commission in Philadelphia and the Classification Appeals Office of the Civil Service Commission.

In this action plaintiffs seek a judgment and an order directing reclassification [8] as of May 8, 1970 (the date of the first adverse action by DPSC) as well as back pay accrued from that date.

For a better understanding of the facts, it is appropriate to explain briefly the function of the ASBCA before whom plaintiffs (and the attorneys at AFLC with whom they compare themselves) practice as Government trial attorneys. The ASBCA serves under the standard contract disputes clause as the authorized representative of the Secretaries of Defense, Army, Navy, and Air Force, to hear and determine appeals from contracting officers' decisions on disputes arising out of contracts between the defense agencies and Government contractors. Hearings before the board are similar to those provided by the regulatory agencies.

Contractors may represent themselves or retain counsel. The Government is represented by counsel from the procurement directorate of the defense component which entered into the particular contract on behalf of the Government. In this way, plaintiffs have the responsibility for representing the Government before the ASBCA in the case of all appeals originating out of DPSC contracts.

The trial section of the Office of Counsel at DPSC consists of plaintiffs at grade GS-905-13, and a chief trial attorney, Oscar A. Moldawer, at grade GS-905-14. Cases are assigned to plaintiffs and to himself by the chief trial attorney on a random basis, and without regard to their comparative difficulty or complexity.

By way of comparison, the trial attorneys at AFLC, Dayton, Ohio, similarly represent the Government before the ASBCA in the case of appeals originating out of Air Force contracts. The Directorate of Contract Appeals consists of the director (a colonel), the deputy director (a lieutenant colonel), and two "divisions" of trial attorneys. Of the total of six civilian trial attorneys, two

[8] Although plaintiffs' petition sought reclassification to the GS-905-*14* level, their brief urges reclassification to the GS-905-*15* level, for reasons developed therein.



are graded GS-905-*15*, three GS-905-*14* and one GS-905-*13*.

The two attorneys serving in the highest graded positions (GS-15) are called senior trial attorneys and operate independently of the "division" system. They are responsible to the director or deputy director for contract appeals. These two handle the most difficult and complex cases. On occasion they may be asked to advise higher authority concerning a complex and significant case.

The three attorneys functioning at the GS-905-14 level are subject to the administrative supervision of the division chief but receive no direct professional supervision. The one attorney at the GS-905-13 level receives both administrative and professional supervision from the division chief.

Position descriptions, which are detailed summaries and analyses of the functions and responsibilities of particular Government jobs, have been prepared for plaintiffs and for the corresponding AFLC positions.[9] A comparison of the position descriptions at DPSC and AFLC demonstrates that they are strikingly similar. In all cases, the major responsibility consists of the preparation and execution of a trial of an appeal before the ASBCA. The only significant dissimilarities exist with respect to the trial attorney positions at AFLC in grades GS-905-15 and 13, whereas plaintiffs' petition is directed to grade GS-905-14. The grade GS-15 job at AFLC describes trial of the "most difficult and most important cases" handled by that command, reflecting a process of selection as well as supervision of attorneys of lower grade. Plaintiffs handle any type of case at DPSC, without preselection. The GS-14 attorneys at AFLC handle the remaining cases, after the "most difficult" have been selected out for the GS-15's. The grade GS-13 position at AFLC envisions work controls, in the form of both administrative and professional supervision, by the division chief.

[9] *See* findings 5, 8, 20 and 21.

At the GS-905-14 level (which is the subject matter of this case), no appreciable differences appear from a comparison of plaintiffs' position descriptions with the corresponding positions at AFLC (other than that plaintiffs also handle the "most difficult" cases). They both require the incumbent to conduct pretrial proceedings, to prepare and file all necessary legal papers, to review and evaluate the facts, to participate in pretrial hearings, to conduct legal research, to interview and select factual and expert witnesses, to brief and argue all motions, to represent the Government at trial, using techniques and legal theories based on their own independent judgment, to submit posttrial briefs, to determine whether and when a case is appropriate for settlement, and, if it is, to negotiate and execute such settlements.

The only differences in the wording of the two descriptions are insignificant. The GS-905-14 position at AFLC includes the furnishing of legal advice to contracting officers on decisions rendered before an appeal is taken to the board. The record shows that plaintiffs perform that pretrial function also. Plaintiffs' descriptions mention final review of ASBCA decisions for the purpose of determining whether motions for reconsideration should be filed. Presumably the trial attorneys at AFLC conduct a similar review within the ambit of their trial responsibilities.

In summary, the grade GS-14 position descriptions at both locations envision a high degree of independent action in preparing and presenting cases before the ASBCA, and both describe the incumbent as merely under administrative, rather than professional, supervision. If there are any differences, they favor plaintiffs.

In spite of the virtual identity of the position descriptions and duties performed pursuant thereto, plaintiffs have been graded at one level below those performing the same trial attorney function at AFLC, resulting in this controversy.

The alleged justification for that result at the administrative level is not easy to follow. It is expressed as a uniform refusal to classify by comparison of positions. The process of classification, it is urged, is based



on the General Attorney Series earlier mentioned. It is expressed as an elaborate and wordy system, designed to produce a precise result.[10] Boiled down to its essentials, positions in this series are rated on the basis of two factors; the difficulty of the work assignments, and the degree of responsibility. After each factor has been evaluated independently, the applicable grade level is determined through the use of a conversion chart. In practical effect, this involves a comparison of the wording of the position description, against the wording contained in the General Attorney Series. It must be assumed that an incumbent actually performs the duties described in his position description. It has been previously illustrated that the position descriptions for grade GS-14 at both DPSC and AFLC are virtually the same.

As a matter of fact, plaintiffs and their counterparts at AFLC have in fact been evaluated at the same level (level D) in terms of the second factor described in the General Attorney Series, namely, "degree of responsibility involved." In its simplest terms, this factor is measured by comparison with three basic levels in the series, described as A, C, and E, in ascending degree of responsibility. Rating of this factor is to reflect the typical, rather than the minimum, characteristics of a position. Although no guidelines are given for levels B and D, these designations are available for optional use where the degree of responsibility falls somewhere between the letters listed above.

Plaintiffs urge strongly that they are entitled to be rated at level E (as are the GS-15's at AFLC) rather than level D on "degree of responsibility." While that argument may have merit, it is not necessary to a disposition of this case to determine whether the assignment of level D is arbitrary or represents an abuse of discretion. Plaintiff's positions and those of the GS-905-14's at AFLC are ranked equally on this factor, and the petition seeks GS-14's, not GS-15's (which is sought in the briefs). In any event, treatment of the other factor is dispositive of the case as set forth in the petition.

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[10] *See* finding 4.

Under the General Attorney Series, the first factor "[n]ature of the case or legal problem," is intended to measure the degree of difficulty to be ascribed to the work performed by attorneys. In determining the "degree of difficulty," several elements are evaluated separately, and are then grouped and assigned to one of three levels of difficulty. Specifically, the elements considered are the complevity of the legal and factual issues involved, the availability of precedent, the impact of the case in economic, social or political terms, its importance as legal or administrative precedent, the nature of the competition encountered, the delicacy of the problem, the public interest, and the amount of money involved. As might be expected, type I includes those cases in which factual and legal questions are easily resolved, precedents are clearly applicable, relatively small amounts of money are involved, and there is little or no impact beyond the immediate parties.

The characteristics of types II and III are more minutely detailed. Type II cases are described as those involving *one* or more of the following features:

(1) Difficult legal or factual questions are involved because of the absence of clearly applicable precedents due to the newness of the program or the novelty of the issue; *or* it is highly arguable which precedents are applicable to the case at issue because of the complexity of the facts or the different possible constructions which may be placed on either the facts or the laws and precedents involved.

(2) The impact of the case or legal problem affects, economically, socially, or politically, either directly or as a legal or administrative precedent, a significant segment of private or public interests (e.g., a large corporation, a large labor group, the residents of a large geographical region of the United States as in a large public works project, a large grant-in-aid program, a nationally organized professional group, the producers of a given farm commodity, the manufacturers of a given product,



a class of Government contractors, i.e., suppliers of a particular service or product, or an important program of a Government agency). Also included in this type are cases or legal problems which have an impact on relations between the United States and foreign governments (e.g., acts by servicemen or other representatives of the United States stationed abroad, questions such as whether or not to buy foreign or American products, or negotiating and drafting consular conventions) and which must be handled with great care.

(3) Large sums of money are directly or indirectly involved (e.g., about one hundred thousand dollars), *or* there is considerable interest from a significant segment of the population * * * *or* the case is strongly contested in formal hearings or informal negotiations by the private individuals, corporations, or Government agencies involved. [Emphasis added.]

Type III cases are described as involving *one* or more of the following characteristics:

(1) Extremely complex and difficult legal questions or factual issues are involved in the drafting, interpretation, or application of legislation, regulations, contracts, orders, decisions, opinions, or other legal instruments and require for their solution a high order of original and creative legal endeavor in order to obtain a reasonable balance of conflicting interests (e.g., legal work involved with balancing the requirements of national security with individual liberties, determining the legality of State and local taxation of the use of Federal Government property by private business firms, recommending or making policy concerning consent decrees in antitrust litigation, or legal work involved in developing material for Executive orders concerning the use of Federal troops in a domestic emergency); *or* complex factual or policy issues are involved requiring extensive research, analysis, and obtaining and evaluating of expert

testimony or information in controversial areas of scientific, financial, corporate, medical, engineering, or other highly technical areas.

(2) The case or problem is such that it can have the effect of substantially broadening or restricting the activities of an agency (e.g., the enforcement of antitrust and trade regulations, tax laws, food and drug laws, or the laws governing securities transactions); *or* it has an important impact on a major industry whose economic position affects the health and stability of the general economy (e.g., a merger or reorganization involving a basic industry, or on the rates, practices, or competitive position of a major industry, for example, the position of the railroads in relation to the motor carriers based on the "reasonableness" of their respective rates, or the position of domestic airlines operating overseas in relation to restrictions on foreign airlines operation in this country). It has an important impact on major private or public interests (e.g., a substantial broadening or restriction of benefits to veterans under the law, amounting to many millions of dollars annually, or a major extension or revision in a State and/or other grant program or a nationwide retirement system, the development of administrative regulations of such scope as the Armed Services Procurement Regulation, a substantial question of civil rights involving the due process clause, or a statement defining the legal rights of the Four Powers with respect to Berlin). Also included in this type are problems of unusual delicacy, such as fraud cases, because of the serious consequence of error and the great burden of proof assumed by the Government.

(3) Cases or problems of this type frequently involve, directly or indirectly, very large sums of money (e.g., about a million dollars) *and/or* they are frequently vigorously contested by extremely capable legal talent (e.g., a major antitrust case).



Interest in these cases is generally nationwide. [Emphasis added.]

On the "degree of difficulty" factor, plaintiffs have been rated as type II. In contrast, the grade GS-14 trial attorneys at AFLC have been rated as type III.[11] As can be seen from the aforementioned conversion chart (finding 4), D-III produces a GS-14.

The initial notification letter of May 8, 1970, stated that the cases handled by plaintiffs compared favorably with type II cases in that difficult legal and factual problems were involved, clearly applicable precedents are lacking, impact affected a significant segment of private or public interests (such as a class of Government contractors or the manufacturer of a given product), large sums of money were involved, or cases were strongly contested. The notification also contained the following statement:

b. The incumbents consider that the type of cases handled are such as to warrant Type III category. However, no conclusive evidence was found to support that contention. Type III cases, in fact, represent the most difficult type of attorney work situations throughout the entire Federal Government. The scope, magnitude and consequence of legal work prescribed for Type III, transcends that which could be recognizable in the subject positions. Even were it possible that some of the trial work might fall

[11] A "Substantiating Analysis" for the GS-905-14 positions at AFLC contains the following statement:

"The attached position is characterized by the following features of the attached description and is, therefore, of Type III. Preparation and drafting without instruction and supervision of opinions and legal instruments which involve complex factual and/or policy issues requiring extensive research, analysis, obtaining and evaluating expert testimony in controversial areas, i.e., scientific, engineer [sic] and financial fields. The cases and problems encountered may have the effect of substantially broadening or restricting the procurement activities of the United States Air Force. Further, the contractors are usually represented by leading attorneys who are extremely capable and who vigorously protest the position taken by the Government as represented by the Trial Attorney."

within the Type III category, it would necessarily have to predominate for it to be credible from a classification standpoint.

The same view has been repeated by the other administrative echelons earlier described.

When one has finally navigated the seas and shoals of words and phrases represented by the General Attorney Series and the position descriptions (*see* findings 4, 5, 8, 20, 21), a simple fact remains. Plaintiffs are responsible for performing as trial attorneys for the Government, before the ASBCA. They handle cases assigned without discrimination as to their relative difficulty or complexity, including the "most difficult." All contract appeals heard by the board originate out of Defense Department contracts governed by the same basic procurement statutes, regulations, and standard contract forms and clauses.[12] The rules of the board under which they practice, apply to cases assigned to plaintiffs, just as they do to any other appeal docketed before the ASBCA. Opinions resulting in part from their efforts are eligible for citation in any brief filed with the board; not just those originating in DPSC or DSA contracts. Similarly they would study and cite cases originating in other components of the Defense Department.

Anyone familiar with the work of trial attorneys, and specifically those specializing in Government contract disputes, knows that the particular commodity being procured by the Government is of relatively little importance in evaluating the difficulty and complexity of the case or the rule in the case. In all cases, a competent trial attorney marshals the evidence, organizes his witnesses, and studies and briefs the legal issues involved. Legal precedents are blind to the subject matter of the contract under review. The reports of this court are replete with decisions (some of which would be classified as "landmark" cases) dealing with procurement by the Army Quartermaster Corps, the functions of which have now been merged into the DSA and its

[12] For that matter, they are essentially uniform throughout the Government.



DPSC. As stated earlier, the DPSC now procures and then distributes food, clothing and medical supplies to the Army, Navy and Air Force and to other non-defense departments of the Federal Government as well.

In this context, position classifiers practice the art of describing in a sea of words, what attorneys do. By means of a conversion table, this art is then endowed with an aura of scientific precision. Alas, the differences in grade which result are often more reflective of attitude, and of the aptitude of a particular classifier in the art of hyperbole. In essence, these plaintiffs are doing the same work in the same department (Defense) at a lower grade because some position classifiers read the same words differently than others.

There is evidence in the record (finding 22) that most of the trial attorneys representing the Government before the ASBCA are in grade GS-14. Two of the ones at AFLC to which plaintiffs directly refer, are at grade GS-15 and they too are under the supervision of others.[13] Acknowledging, arguendo, that plaintiffs are not entitled to the grade (GS-15) reserved for the civilian trial attorneys handling the most difficult appeals at AFLC, it does not follow that they should be assigned grade GS-13. That grade is reserved at AFLC for the single trial attorney handling the easiest cases, and who acts under both administrative and professional supervision. At DPSC, cases of all degrees of difficulty are assigned to plaintiffs, and they function under the most general supervision. The grade GS-14 they seek in their petition is reserved at AFLC for trial attorneys whose cases are screened, the most difficult being assigned to the GS-15 attorneys.

Defendant has proffered evidence in affidavit form to the effect that there is a difference in the degree of difficulty of work performd at the two locations. This affidavit suffers from the same defect as plaintiffs' affidavits stating that no such difference exists. None of the affiants has personal knowledge of the detailed work

[13] A colonel and a lieutenant colonel. *Cf. Bookman* v. *United States*, 197 Ct. Cl. 108, 113 n. 3, 115, 453 F.2d 1263, 1266 n.3, 1267 (1972).

performed by the others. The relevant evidence consists of the two comparative position descriptions at GS-14 which outline virtually identical duties and responsibilities. They establish a presumption of equality which is not overcome by any competent evidence on this record.

The screening process at AFLC suggests a difference which in fact favors plaintiffs' position. Suffice it to say that, on this record, it is probable that the GS-14 trial attorneys before the ASBCA operating out of AFLC and these plaintiffs at DPSC could be interchanged, and handle one another's cases with equal difficulty or facility after an initial break-in period.

Defendant urges that this court lacks jurisdiction over a case of this type. The Classification Act of 1949 [14] provides:

> It is the purpose of this chapter to provide a plan for classification of positions whereby—
>
> (1) in determining the rate of basic pay which an employee will receive—
>
> (A) the principle of equal pay for substantially equal work will be followed * * *.

The basic jurisdictional act of this court [15] states that it "shall have jurisdiction to render judgment upon any claim against the United States founded * * * upon * * * any Act of Congress * * *." A recent amendment [16] authorizes the court to "* * * as an incident of and collateral to any such judgment, issue orders directing * * * placement in appropriate duty * * * status * * * and such orders may be issued to any appropriate official of the United States."

Although the court has been aware of the limitations on its power to substitute its judgment for that of others

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[14] Ch. 782, 63 Stat. 954, codified at 5 U.S.C. § 5101 (1970).

[15] 86 Stat. 652, codified at 28 U.S.C. § 5101 (1970).

[16] Pub. L. No. 92-415.



acting in the realm of their discretion,[17] it has not hesitated to do so where the exercise of discretion being reviewed has been arbitrary, or is unsupported by substantial evidence.[18] On the evidence in this case, it is concluded that the refusal to reclassify plaintiffs to GS-14 is arbitrary, discriminatory, and is not supported by substantial evidence.

Plaintiffs have requested both reclassification and back pay, basing the latter request on the provisions of the Back Pay Act [19] which authorizes recovery for employees who have undergone an "unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials" of the position.

It is concluded that under the literal wording of that act, plaintiffs are not entitled to back pay. The refusal heretofore to reclassify their positions has not caused either a reduction in or termination of salary or allowances such as would trigger the provisions of the Back Pay Act.

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[17] *Cf. Bookman*, note 13 *supra*. *See also Almeda* v. *United States*, 197 Ct. Cl. 81, 453 F.2d 1397 (1972); *Albert, et al.* v. *United States*, 194 Ct. Cl. 95, 437 F.2d 976 (1971); *Haynes* v. *United States*, 190 Ct. Cl. 9, 418 F.2d 1380 (1969); and *Holman* v. *United States*, 181 Ct. Cl. 1, 383 F.2d 411 (1967).

[18] *Cf. Drucker, et al.* v. *United States*, 195 Ct. Cl. 335, 451 F.2d 619 (1971); and *Nordstrom* v. *United States*, 177 Ct. Cl. 818 (1966).

[19] 5 U.S.C. § 5596 (1970).

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

> "(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period * * *."

But this court can certainly direct the reclassification of these plaintiffs. In *Drucker*,[20] decided prior to the enactment of Pub. L. 92-415,[21] the court was limited to a stay of its proceedings, affording the agency involved an opportunity to revise its action in the light of the court's opinion. The recent rounding out of the court's jurisdiction by the enactment of Pub. L. No. 92-415, permits more direct action in this case.

It is concluded that plaintiffs are entitled to an order to the appropriate official directing their reclassification to grade GS-905-14.

## FINDINGS OF FACT

1. Plaintiffs Herman R. Testan and Francis L. Zarrilli are and, at all times relevant herein, were employed by defendant as trial attorneys, classified at grade GS-905-13, in the Office of Counsel, Defense Personnel Support Center (DPSC), Defense Supply Agency (DSA), Philadelphia, Pennsylvania.

2. The DPSC procures and distributes wholesale stocks of food, clothing and medical supplies to the U.S. military services worldwide, and to other authorized departments of the Federal Government.

3. Plaintiff Testan described the scope of his work as follows:

> * * * As of that date [25 January 1972] 39 appeals to the Armed Services Board of Contract Appeals were assigned to your deponent involving claims by contractors against the Government and by the Government against contractors. The claims encompassed a number of primary issues, including propriety of terminations for default, entitlement to excess repurchase costs, propriety of invocation of warranty, interpretation of contract specifications, interpretation of contract terms, delay claims based on delays due to Government acts or omissions, defective Government-furnished property claims, impossibility, equitable adjustments, shortages of Government-furnished Materials, accord and satisfaction, timeliness, defective pricing, etc. In prosecuting and defending against these claims, numerous sub-issues are involved, including excusability, waiver, estoppel, similarity of contract and repurchased items, abandonment, renegotiation, propriety of test methods and results, know-how, cost accounting, production standards, state of the art, burden of proof, etc. During the trial of these appeals, your deponent is generally required to use expert witnesses in many fields, including production engineering, mechanical engineering, chemical engineering, laboratory analysis, metallurgy, plastics, roofing, veterinary science, accounting, dairy science, food processing, law, medicine, drugs, medical equipment, weaving and finishing of textiles, embroidery, and many more. These witnesses are highly competent individuals, some having more than one college degree, and many are widely recognized for their expertise. In most of these appeals, your deponent has been and still is opposed by outstanding counsel from prominent law firms engaged primarily in the practice of procurement law, including such names as Cuneo, Kostos, Witte, Schwag, etc.
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> 4. As of 25 January 1972 * * * the 39 appeals assigned to your depondent had a total known dollar claim value of approximately $5,215,167.00. In addition to this known amount, there is potentially a very large but undetermined dollar amount which the Government will be required to pay in six appeals should appellant establish impropriety of terminations for default, which would convert them to terminations for the convenience of the Government.

In addition, Mr. Testan stated that the total number of appeals assigned to him varied from month to month and that, during the period of December 1971 to June 1972, his assigned caseload ranged from 30 to 42 cases on representative days. The number of appeals tried be-

[20] Note 18 *supra*.

[21] *See* text at note 16 *supra*.

fore the ASBCA also varied. In 1970 seven appeals were tried; in 1971, 18. Appeals either being tried or scheduled for trial in 1972 numbered six and Mr. Testan anticipated six for 1973 at the time of his statement. Although the duration of the individual appeals varied, Mr. Testan also stated that the average length was approximately 1 week. He descriped a then current trial which had been in session, at the date of his statement, for 5 weeks and he anticipated an additional 4 weeks of trial in that case.

4. Plaintiffs' positions are subject to classification under GS-905-0, entitled "General Attorney Series." The method of evaluation for nonsupervisory attorney positions is stated to be as follows:

> There are a number of elements which together determine the difficulty and responsibility of attorney positions. These elements fall into two main categories (or factors): (1) *nature of the case or legal problem* and (2) *level of responsibility.* While there is some relationship between these two factors, each one is measured separately to recognize the fact that they do not necessarily appear in attorney position in proportionate degrees. For example, an attorney may be involved in a high-level legal case or problem, but his degree of responsibility may be limited. Conversely an attorney may be involved in a relatively routine legal case or problem, but he may be operating with a high degree of responsibility. The level assigned to one factor together with the level assigned to the other factor will determine the grade of the position according to the conversion table at the end of the standard.
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> * * * *
>
> (1) *Nature of the case or legal problem.* This factor incorporates all those elements in a case or a problem which tend to make it more or less difficult to resolve satisfactorily. These elements measure the inherent difficulty of the legal and factual questions involved in a case or problem, as distinguished from the nature or extent of the individual's responsibilities for resolving the problem, the supervision he receives, extent of significant personal contacts, or any other performance element.
>
> Among the elements are such things as the *complexity of legal and factual issues.* This element is obviously a key one, i.e., the more complex the legal or factual issues—the more difficult the resolution of the case. A byproduct of a complex legal or factual issue is often the negotiation and preparation of a complex contract or other legal document.
>
> The *impact of the case or problem* (in economic, social, or political terms) on the public, on relations with State or local governments, on national defense, on foreign relations, on private interests, or on agency authority, operations, procedures, or practices, is also an important consideration in evaluating the nature of the case or legal problem. When a legal matter materially affects any of the foregoing the consequences of the legal advice or decision may be far reaching and the damage which can be inflicted on the parties concerned or on the Government's prestige is often irreparable.
>
> The *importance of the case or legal action as legal or administrative precedent* is very significant. In the vast area of administrative law, agency actions cumulatively reflects policies and trends. When a precedent-setting situation arises it can easily undo something which has taken years to attain. Often a relatively uncomplicated situation can become a test case of extreme importance to a Government agency or non-Government interested groups. Precedent-making cases or actions make for responsible legal endeavor whether or not large amounts of money or complex legal or factual issues are involved. To measure the significance of a precedent case or action it is necessary to consider it in relation to the significance of its consequences. Consideration of the precedent in terms of the element, *impact of the case or problem* (in economic, social, or political terms), is required.

The *nature of the competition* encountered may be significant. Just as in an athletic event, the tougher the competition—the tougher the contest. Usually, tough competition is an indication that something important is at stake—whether it be money, a precedent in the making, or some other important consideration.

The *nature and availability of precedent decisions* is another important constituent of the factor, *nature of the case or legal problem.* If precedents are clear cut and plentiful, the attorney's job is ordinarily relatively simple. When precedents are few or conflicting, his job is more difficult.

Occasionally the *delicateness of the problem* becomes an all-important consideration in evaluating the nature of the case or legal problem. What might ordinarily be an uncomplicated legal or factual situation, with no foreseeable precedent-setting value, may develop into a very delicate matter which could possibly embarrass public officials or the Government in the eyes of officials of a foreign government.

*Public interest* in a particular legal matter has an effect on the nature of the case or legal problem as does the delicateness element. No matter how routine a situation may be, it becomes a difficult one to resolve when public interest is great.

*Money* is another element which may have a significant effect on certain legal cases or problems. The review, preparation, and negotiation of contracts and other legal documents, the conduct of hearings and trials, the giving of advice to administrators, the review and preparation of drafts of legislation, and any other attorney endeavor will generally require special care and attention when a large amount of money is involved, unless the case or problem is otherwise routine (e.g., review of a standard form contract). Also, not all legal matters involve money nor can they be equated to money terms. Such matters are evaluated in light of other elements.

* * * *



These elements are not independent of one another. For example, the economic, political, or social impact of a case cannot be considered apart from its importance as a legal or administrative precedent. If a case is precedent setting, its impact in any of these terms is compounded. Likewise, a case that involves a considerable amount of money or materially affects a significant segment of private and public interests is apt to be strongly contested or negotiated by highly competent legal counsel. On the other hand, less emphasis ordinarily should be given to these elements of impact when the legal questions are clearly drawn and covered by clearly applicable precedents. Therefore, the interrelationship of these elements must be considered in evaluting the nature of the case or legal problem.

* * * *

Many (if not most) attorneys are engaged in the business of *preventing* litigation or other legal problems from developing, rather than resolving them once they have developed. In these situations, such elements as impact or public interest are not as apparent as they would have been had a problem arisen. However, positions involved in preventive legal work are credited similarly to those positions involved in resolving the problems, i.e., those elements of the nature of the case or legal problem which are not manifest, as a result of the preventive action, should be credited as they would have been if the situation had attained major proportions.

* * * *

Unless the word "case" can be seen from the content to mean formal litigation, the words "case" and "legal problem" are used herein in their generic sense and encompass any legal assignment performed by an attorney whether it be of a formal or informal nature.

* * * *

(2) *Level of responsibility*—This factor incorporates all those elements which are indicative of the level at which an attorney carries out his assignment. The factor includes the functions performed, the supervision and guidance received, the personal work contacts, and the nature and scope of recommendations and decisions.

The level of *functions* performed provides perspective to the level of responsibility factor. It reflects the maturity level of the attorney's endeavors in terms of what he does in connection with a case or legal problem. This element includes functions involved in trial, advisory, hearing, and legislative work. Each of these functions has parallel types of responsibilities, contacts, recommendations, and decisions depicted at the various intensity levels of this factor.

In some instances an attorney may lay the groundwork for presentation of the Government's case, but the actual trial is conducted by another attorney. In determining the level of trial work represented by the attorney who prepared the case, the extent of his participation is weighed. If he lays the complete groundwork for the Government's case, his position is credited as it would have been had he personally tried the case. In short, trying a case is not inherently more difficult than preparing the same case for trial or vice versa.

Many Justice Department attorneys (and attorneys in other agencies responsible for the conduct of litigation in Federal courts) are responsible for considering, among other things, whether a matter is of sufficient importance to warrant prosecution; whether there is adequate evidence; and whether prosecution is likely to affect adversely other cases which may have originated in different agencies and are pending decision by the courts. These are considerations which can be credited only to the Justice Department attorney positions and to attorney positions in other agencies responsible for the conduct of litigation in Federal courts.



*Supervision and guidance received* is another element necessary in evaluating the attorney's level of responsibility. With more or less supervision and guidance the attorney's responsibilities decrease or increase as the case may be. The attorney who is given a problem to resolve with no accompanying instructions obviously has a greater degree of responsibility than another attorney who is given a similar problem with detailed instruction as to what to do and how to do it.

The *personal work contacts* element is another reflector of the attorney's level of responsibility. Other things being equal, the more important his contacts—the greater his responsibilities. For example, an attorney who presents his agency's view to a congressional committee has a greater degree of responsibility than an attorney who presents a similar explanation to his counterpart attorney in another agency. Many attorneys, however, while performing very difficult and important work, do not have need to contact persons other than their immediate associates. Positions of attorneys performing these noncontract functions are not to be penalized if they have the other characteristics of a particular level of responsibility.

The *nature and scope of recommendations and decisions* is again an element which indicates the level of an attorney's responsibility. The more important and authoritative his recommendations and decisions—the greater his degree of responsibility. An attorney rendering substantive advice on the terms of a contract has a gerater degree of responsibility than an attorney reviewing the same contract for legal sufficiency and inclusiveness of the language.

* * * *

Three levels of intensity are described for each of the two basic factors. With respect to factor 1, nature of the case or legal problem, the three levels describe what could be classed *simple*, *difficult* and *most difficult* cases or legal problems. These levels

are intended to cover the full range of cases or problems. If a case or problem does not satisfy the requirements indicated for the level of one of the types, it is identified with the next lower type because each type is described in terms of the minimum characteristics of the range of difficulty it represents.

The three ranges of difficulty or importance for nature of the case or legal problem represent the span of difficulty or importance of attorney work throughout the Federal Government. They are *not* intended to represent a span of difficulty or importance of attorney work found in every agency. Some agencies will not have cases or legal problems of the nature described in the third range.

With respect to factor 2, level of responsibility, the three levels cover what may be described as the *beginning*, the *intermediate*, and the *senior* attorney levels. The levels are labeled (A), (C), and (E), in recognition of the fact that there are positions that fall between these (described) levels. These intervening levels are represented by omitted letters (B) and (D). Unlike the levels described for nature of the case or legal problems, which are described in terms of minimum characteristics, these levels are described in terms of *typical* characteristics. Accordingly the intervening level (B) is appropriate when, for example, a position *compares with* level (A) in some respects and level (C) in others. The intervening level is also appropriate when a position *falls clearly between* two of the levels described with respect to the majority of elements. Unlike the type III level of factor 1, level E is not intended to be inclusive of the highest level of responsibility of nonsupervisory attorney positions.

The grade of an attorney position is determined on the basis of the combination of the highest factor levels which are representative of the position to a significant extent.



A grade-level conversion chart is provided showing how combinations of the two factors (*nature of the case or legal problem and level of responsibility*) convert to grade levels. The conversion chart includes the intervening levels (B) and (D), as well as the described levels (A), (C), and (E), for the *level of responsibility* factor.

* * * *

## THE USE OF EXAMPLES TO ILLUSTRATE LEVELS

In the description of levels for the two factors, in some instances, illustrative examples of difficulty and responsibility are included. These examples are illustrative only and are not intended to be all inclusive. They are to be used only as guides in classifying attorney positions. In other words, the absence, from a given level, of a specific example, does not preclude the use of that level (if it is otherwise appropriate) in the evaluation of a position.

## VARIETY

Variety has not been used as a separate element in this standard, since many attorney positions are inherently varied. In smaller organizations particularly, attorney positions may encompass a range of subjects and activities. Accordingly, at the various degree levels of the standard, work examples are cited which are illustrative of positions involving variety.

### 1. *NATURE OF CASES OR LEGAL PROBLEMS*

*Type I*

Legal work of this type is characterized by the following features:

(1) The legal question or factual situation can be relatively easily resolved in the light of the well-established or easily de-

terminable facts and clearly applicable precedents involved

(2) The impact of cases or legal problems is local, or limited to the parties directly concerned (private individuals or a local industry) since legal or administrative sanctions, fines, or penalties are relatively minor and involve no new precedents of wider potential impact.

(3) Relatively limited sums of money are involved (e.g., a few thousand dollars). The cases have no widespread social or political impact. For example, where industry practices are involved no major effect on the industry can result from the decision. There is limited public interest in the case or legal problem.

*Type II*

Legal work of this type is characterized by *one* or more of the following features:

(1) Different legal or factual questions are involved because of the absence of clearly applicable precedents due to the newness of the program or the novelty of the issue; or it is highly arguable which precedents are applicable to the case at issue because of the complexity of the facts or the different possible constructions which may be placed on either the facts or the laws and precedents involved.

(2) The impact of the case or legal problem affects, economically, socially, or politically, either directly or as a legal or administrative precedent, a significant segment of private or public interests (e.g., a large corporation, a large labor group, the residents of a large geographical region of the United States as in a large public works project, a large grant-in-aid program, a nationally organized professional group, the producers of a given farm commodity, the manufacturers of a given product, a class of Government contractors, i.e., suppliers of a particular service or product, or an important program of a Government agency). Also included in this type are cases or legal problems which have an impact on relations between the United States and foreign governments (e.g., acts by servicemen or other representatives of the United States stationed abroad, questions such as whether or not to buy foreign or American products, or negotiating and drafting consular conventions) and which must be handled with great care.



(3) Large sums of money are directly or indirectly involved (e.g., about one hundred thousand dollars), or there is considerable interest from a significant segment of the population (see paragraph 2 above), or the case is strongly contested in formal hearings or informal negotiations by the private individuals, corporations, or Government agencies involved.

*Type III*

Legal work at this level is characterized by *one* or more of the following features:

(1) Extremely complex and difficult legal questions or factual issues are involved in the drafting, interpretation, or application of legislation, regulations, contracts, orders, decisions, opinions, or other legal instruments and require for their solution a high order of original and creative legal endeavor in order to obtain a reasonable balance of conflicting interests (e.g., legal work involved with balancing the requirements of national security with individual liberties, determining the

legality of State and local taxation of the use of Federal Government property by private business firms, recommending or making policy concerning consent decrees in antitrust litigation, or legal work involved in developing material for Executive orders concerning the use of Federal troops in a domestic emergency); or complex factual or policy issues are involved requiring extensive research, analysis, and obtaining and evaluating of expert testimony or information in controversial areas of scientific, financial, corporate, medical, engineering, or other highly technical areas.

(2) The case or problem is such that it can have the effect of substantially broadening or restricting the activities of an agency (e.g., the enforcement of antitrust and trade regulations, tax laws, food and drug laws, or the laws governing securities transactions); or it has an important impact on a major industry whose economic position affects the health and stability of the general economy (e.g., a merger or reorganization involving a basic industry, or on the rates, practices, or competitive position of a major industry, for example, the position of the railroads in relation to the motor carriers based on the "reasonableness" of their respective rates, or the position of domestic airlines operating overseas in relation to restrictions on foreign airlines operation in this country). It has an important impact on major private or public interests (e.g., a substantial broadening or restriction of benefits to veterans under the law, amounting to many millions of dollars annually, or a major extension or revision in a State



and/or other grant program or a nationwide retirement system, the development of administrative regulations of such scope as the Armed Services Procurement Regulation, a substantial question of civil rights involving the due process clause, or a statement defining the legal rights of the Four Powers with respect to Berlin). Also included in this type are problems of unusual delicacy, such as fraud cases, because of the serious consequence of error and the great burden of proof assumed by the Government.

(3) Cases or problems of this type frequently involve, directly or indirectly, very large sums of money (e.g., about a million dollars) and/or they are frequently vigorously contested by extremely capable legal talent (e.g., a major antitrust case). Interest in these cases is generally nationwide.

2. *LEVEL OF RESPONSIBILITY*

*Level A*

*Nature of functions*

This level is characterized by functions, examples of which are listed below.

Searches case reports, legal documents, periodicals, and textbooks; and prepares tentative drafts of letters, memoranda, and legal documents for use by higher-grade attorneys in the preparation of opinions, legislative reports, briefs, contracts, and other papers or legal documents (i.e., particular points of law as decided in previous cases; background information and legal references as a basis for advising on management plans and policies, compilation of legal issues and legislative history in connection with pending legislation).

Assists the attorney in charge of a court case or an administrative proceeding by interviewing and select-

ing appropriate witnesses, preparing them to give testimony, conducting direct examination, suggesting questions to be asked in cross-examination, cross-examining witnesses after the line of questioning has been settled, and drafting findings of fact, conclusions-of-law, and orders based upon the record.

Prepares cases for filing by drafting complaint, order to show cause, indictment, preliminary motions, and supporting affidavits and briefs.

Prepares drafts of pleadings, motions, and interrogatories in connection with cases in litigation.

Conducts investigations of limited scope to obtain facts, studies legal precedents, and prepares recommendations for review of a supervisor.

*Supervision and guidance received*

Legal research is performed in accordance with preliminary instructions as to methods of approach, source material available, and policy and precedent of the office.

Participation in hearings is limited to examination or cross-examination where the line of questioning has been carefully laid down by the attorney in charge of the case and where the issues with respect to the points to which the particular witness is expected to testify are well defined and narrow in scope.

Completed written work is thoroughly reviewed usually by an attorney of higher grade who points out errors, omissions, and inadequacies, and corrects or directs the incumbent to correct them.

*Personal work contacts*

Personal work contacts constitute a relatively minor element at this level. The most important contacts are those involved in fact gathering. Contacts initiated by the incumbent are principally in obtaining information and/or legal references pertinent to the problem under study, and interviewing prospective witnesses, claimants, or other persons having knowledge of the facts involved in the problem or the case. As experience is gained, may advise agency personnel on minor matters or may participate in hearings or trials through examining witnesses along lines of inquiry laid down by an attorney of higher grade level.



Attendance at conferences with representatives of other agencies, industry, State and local governments, higher administrative officials, or congressional committees and their staffs is largely as an observer to gain experience.

*Nature and scope of recommendations and decisions*

The incumbents are responsible for the accuracy of factual information and legal citations, which are incorporated in the decisions, opinions, briefs, and other legal documents prepared by attorneys of higher grade level. Legal opinions, analyses, and conclusions ordinarily are not expected to be in finished form (except for relatively routine legal correspondence).

*Level C*

*Nature of functions*

This level is characterized by functions, examples of which are listed below.

Conducting legal research in connection with:

(1) Cases pending administrative hearings, trial before courts of original jurisdiction, or argument in appellate courts.
(2) Legal questions referred by administrative officials of the employing agency, such as questions concerning the interpretation and application of statutes, rules, and regulations as they pertain to contracts, claims, or other legal instruments involving private business, State, local, national, or foreign matters.
(3) Questions regarding the effects of provisions of proposed legislation or proposed changes in agency policies or regulations.

Where further development of facts is needed, refers question back to originating organization, to the operating organization affected by a proposal, or to the investi-

gating arm of the employing agency, indicating the precise nature of information required. In criminal cases may recommend a grand jury investigation.

In some situations, personally conducts research or investigation of the facts as well as the laws, regulations, and legal precedents. Such research or investigation may involve any of the following:

(1) Analyzing the factual and legal issues presented to determine what further facts are needed and what legal sources are applicable.
(2) Reviewing policies, procedures, regulations, technical manuals, and other agency publications.
(3) Studying industry and trade practices; policies, procedures, and operations of other Government agencies or of the States or local bodies; or business, technical, and professional publications and other authoritative sources of information required in the technical interpretation of factual issues.
(4) Conducting research of laws, legal opinions, policies, regulations, legal texts, and precedent cases bearing on the legal issues involved in the problem, proposal, or case.
(5) Conducting pretrial examination of witnesses, or —in the performance of advisory services or legislative review—interviewing operating officials, industry spokesmen, and other interested persons to complete the background investigation.
(6) Preparing memoranda or reports outlining the facts and legal issues, analyzing the factual and legal issues involved, explaining the application of legal principles and precedents, and justifying recommendations or conclusions.

On the basis of the research or investigation, prepares necessary legal documents, advisory opinions for administrative personnel, drafts or comments on proposed legislation or changes in regulations, or recommendations on the advisability of instituting a civil or criminal suit, an administrative hearing, or other disposition.



When litigation is undertaken, prepares and/or presents, or provides technical guidance during, the prosecution of the Government's or the agency's case in an administrative hearing, before a court of original jurisdiction or appellate court. Prepares charges, show cause orders, complaints, briefs, motions, and other documents preparatory or incident to the trial of the case.

Participates in pretrial or prehearing conferences, examines and cross-examines witnesses, argues motions before the court or hearing officer, and summarizes the Government's or the agency's case.

When the activities of the agency require entering into contractual relations, negotiates (usually as a member of a team) with the representatives of private business or of State, local, or foreign governments, and drafts the necessary contracts and other legal documents.

Examines formal filings for legal sufficiency and full disclosure required to be made by statutes, rules, and regulations. Conducts or participates in conferences with legal counsel of registrant, or reviews opinions of counsel as to meeting filing requirements. Conducts any investigation and any subsequent administrative proceedings in connection with such matters.

Some of the functions enumerated above may be delegated to attorneys of lower grade level, who work under the guidance of the incumbent.

Also characteristic of this level are such duties as examining petitioners, claimants, and defendants against charges brought under the administrative regulations of any agency; and preparing reports, exhibits, and legal memoranda from the records and hearings, outlining the factual and legal issues and the recommendation for disposition of the case for the consideration of quasi-judicial officers or bodies, or the courts.

Acts regularly as the legal adviser on the plans and operations of a single program or activity, characterized usually as a distinct entity with separate, identifiable operations, authorized by law to accomplish a specific purpose (e.g., child health, school assistance in federally affected areas, interstate quarantine) but included in a group of related programs. May also serve as the as-

signed specialist on a single program or a major phase of several related programs or major activities.

Reviews for legal soundness and accuracy program material emanating from operating units of the organization.

In cases of sufficient scope and complexity to require the services of a staff of several attorneys or other specialists to present the Government's case or position, has responsibility for conducting *a phase* of the trial or other type legal problem under the guidance of the attorney in charge.

*Supervision and guidance received*

Incumbents of positions at this level of performance are expected independently to plan, organize, and conduct studies of the mill run of legal problems, cases, or legislative proposals encountered in their respective programs. They are apprised of any unusual circumstances surrounding the case or the problem, any background information which must be considered, and any important policy considerations that will govern development of the case or the solution.

Beyond this, they normally work independently in investigating the facts, searching legal precedents, defining the legal and factual issues, drafting the necessary legal documents, and developing conclusions and recommendations.

Completed work is normally assumed to be accurate with respect to legal citations, treatment of facts, and other aspects of technical treatment. However, all written work is subject to review for soundness of approach and argument, application of legal principles, and consistency with governing policies, procedures, and regulations of the employing agency.

Before a case is presented in an administrative hearing or before a court, the supervisor discusses the presentation, the line of approach, the possible lines of opposition to be encountered, and other aspects of the case to insure that proper groundwork has been laid for successful prosecution of the case.



*Personal work contacts*

Generally, personal work contacts are an important characteristic of this level. Effectiveness is required in presentation, exposition, and argument in presenting cases to administrative hearings and to courts.

Attorneys participate in pretrial or prehearing conferences with industry representatives or private citizen claimants, defendants, or petitioners and their attorneys, explain points of law, charges, or qualifications of claimants, and refer suggested settlements or compromise offers to superiors with appropriate recommendations.

They advise negotiating officials in legal contractual matters by recommending appropriate clauses, provisions, and general wording.

Also characteristic of this level is participation in conferences with representatives of operating programs, State and local governments, industry, private organizations (e.g., veterans organizations, professional associations), or other Government agencies in developing or evaluating proposed changes in legislation or agency policies or regulations.

Incumbents participate in negotiations concerning conflicts in State and Federal regulations with State officials.

Incumbents assist the staffs of congressional committees in technical drafting of legislation.

*Nature and scope of recommendations and decisions*

Recommendations to those outside the agency or to administrative officials at higher levels are normally made through the supervisor. Examples of recommendations characteristic of this level include:

(1) Whether to initiate criminal or civil suits against alleged violators of Federal laws and regulations.
(2) Settlement of claims against the Government brought by private citizens.
(3) The organization, order of presentation, and line of argument to be used in the presentation of cases or hearings delegated to the incumbent as the trial attorney.

(4) Settlement of suits brought by the government against others (e.g., offers in compromise in income tax cases).
(5) Replies to requests for legal advice or interpretations of law arising out of the day-to-day operations of agency programs.
(6) Substantive changes in legislation and agency policies or regulations to make them more equitable, responsive to needs, or easier to administer.
(7) Whether to approve a contract or other legal document in its proposed form and content.

*Level E*

*Nature of functions*

This level is characterized by functions, examples of which are described below.

Reviews cases for agencies responsible for the conduct of litigation in Federal courts to determine whether to recommend prosecution. Considers the weight of the evidence, the importance of the case, the necessity of uniform application of the law throughout the land, the cost of litigation, and other considerations which bear on the advisability of instituting suit. Prepares a memorandum of fact and law and recommends whether prosecution should be undertaken. Generally, the memorandum is submitted directly to the individual responsible for authorizing formal legal action. If prosecution is authorized, initiates the filing of papers with the appropriate court, prepares and tries the case, or prepares the case for trial by another attorney. If the case is assigned to another attorney for trial, may advise and assist him. This assistance may extend to active participation in the presentation of the case, preparing witnesses, examining and cross-examining witnesses, and consulting with the trial attorney with respect to the line of argument.

Reviews, for agencies responsible for appellate litigation, records of suits for or against the Government in which the decision was unfavorable to the Government to determine whether to recommend appeal to a higher court. Considers the effect of the decision as a precedent



if allowed to stand, the weight of the evidence, the need for consistent application of the law in all jurisdictions, the amount of money involved, the cost of litigation, and other considerations bearing on the advisability of appeal. If appeal is recommended, and the recommendation approved, may prepare and/or present the Government's case before the appellate court.

Drafts legislation or prepares complete reports on changes in basic legislation. Drafts or receives proposed legislation and refers to organizations having jurisdictions over programs which would be affected by the proposed changes in law. Evaluates the proposed legislation in terms of its foreseeable effect on agency programs, policies, procedures, regulations, methods of operation, and extent of operation, and on existing legislation. This evaluation is based on an analysis of the comments of operating organizations, the incumbent's own program knowledge, his awareness of the legal implications of the proposed legislation, and his knowledge of related legislation. Similar functions are performed with respect to the formulation and/or coordination of treaties or other international agreements or of rules, regulations, or policies applicable to major programs of the agency.

At the highest level of drafting or reviewing proposed agency decisions, analyzes the records, including transcription of testimony and pleadings, evaluates facts, determines questions of law, and either recommends adoption of a decision prepared by another attorney or drafts his own decision for consideration and adoption by agency officials who exercise final authority in such matters. This does not preclude the use of this level for positions at subordinate organizational echelons if, in fact, the drafting or reviewing of proposed agency decisions at such echelons is independently done, is directly submitted (with no further technical review) to agency officials who exercise final authority, and is given weight and effect equal to the recommendations of incumbents of positions at the highest agency level of drafting or review.

Acts as principal attorney in charge of the preparation and presentation of cases before administrative tribunals or before the trial or appellate courts, where the cases (a) are of such scope that they may, in many instances, warrant the assistance of one or more attorneys of lower grade or other specialists and (b) are of such importance that they frequently involve matching professional skills against some of the most distinguished and highly paid legal talent in the country. The principal attorney exercises full responsibility for the development and presentation of the case.

Acts as principal attorney in charge of recommending the policies and developing the procedures and regulations implementing new or amended legislation (e.g., new or revised grant-in-aid programs) for the employing agency. Is responsible for insuring that these policies, procedures, and regulations are consistent with the intent of the law and are administratively sound, efficient, and economical in operation. In developing the details of operations considers the needs, desires, and attitudes of administrators, State and local officials, industry representatives, the general public, or others who may be affected by the new or revised program.

Acts as legal counsel to the head of a major operating program of the department or agency (e.g., a bureau, command, technical service, or regional office or field installation when the field installation has been delegated unusual authority or authority commonly of a higher echelon). Is responsible for advising on questions of law or administrative policy involved in the operations of the organization and in its contacts with industry, private and professional associations, State, local, or foreign government, or the general public. Advises on laws, regulations (including those who have the effect of law) of his own and other Federal agencies, opinions of the Comptroller General or the agency's general counsel, common law, administrative law, etc. Answers questions which are covered by interpretations of the Comptroller General or other legal authority. Is responsible for recognizing those questions which require an interpretation by such legal authority. Prepares recommended interpretation outlining the facts and the applicable law. Is responsible for developing the material which, in effect, becomes the agency's justification for the conduct of litigation on behalf of the agency by a litigating agency.



Sits as a quasi-judicial officer hearing cases involving claims against the Government, complaints, or requests for relief from the provisions of agency regulations which have the effect of law; conducting investigative hearings pursuant to statutory provisions to establish a formal written record; hearing charges brought by the Government against violators of provisions of law or regulations; or hearing cases arising under the disputes clause of a government contract. Renders decisions on the points of law or constructions of fact in dispute and directs corrective action, payment of claim, or discretionary relief depending on the merits of the case and the penalties and permissible relief under law and regulations.

*Supervision and guidance received*

Attorneys at this level are expected to carry out any assignments within their area of responsibility without preliminary instruction. At the time an assignment is made the supervisor may discuss the significance of the problem and give any background information received. From this point, the incumbent independently conducts the investigation or negotiation, plans the approach, and develops the completed decision, report, brief, opinion, contract, or other product; or represents the Government at the conference, hearing, or trial. Where a hearing or trial is involved, the supervisor may be briefed on the overall approach to be taken and the line of argument to be pursued, especially where an important precedent effect is anticipated or there is widespread public interest in the outcome. Completed work in the advisory or legislative and regulatory areas is reviewed before it is signed out for consistency with agency policy, for possible precedent effect, and for overall effectiveness.

*Personal work contacts*

This level is characterized by the most responsible personal contacts, examples of which include:

(1) Conferring or negotiating with top administrative personnel in the agency, private business, or State, local, or foreign governments on important legal and policy questions.
(2) Advising and assisting congressional committees and their staffs in drafting legislation or giving expert testimony before congressional hearings on legislative proposals.
(3) Trying cases before courts or administrative bodies.

*Nature and scope of recommendations and decisions*

Recommendations characteristic of this level are similar to those characteristic of level (C). The major difference is that at this level advice on the interpretation of law or on proposed changes in legislation, policy, and regulations is often given directly to heads of programs, bureau chiefs, cabinet officers, congressmen, or representatives of State and local governments. In some instances recommendations are made through supervisors, as at level (C), but these recommendations are usually tantamount to final decision. This is particularly pertinent to positions concerned with recommending whether to prosecute cases or to appeal adverse decisions in agencies responsible for litigation.

Incumbents are responsible for recognizing when the matter under discussion is of such precedent-setting nature or of such importance or delicacy that his advice must be cleared with superiors before it is given out.

Attorneys at this level often deal with matters of such scope and complexity that they require the concentrated efforts of several attorneys or other specialists. In such circumstances attorneys at this level are normally responsible for directing, coordinating, and reviewing the work of the team.



GRADE-LEVEL CONVERSION CHART

| *Nature of Cases or Legal Problems* | *Level of Responsibility* | *Grade* |
|---|---|---|
| TYPE I | A | * |
| | B | 9 |
| | C | 11 |
| | D | 12 |
| TYPE II | A | 9 |
| | B | 11 |
| | C | 12 |
| | D | 13 |
| | E | 14 |
| TYPE III | A | 11 |
| | B | 12 |
| | C | 13 |
| | D | 14 |
| | E | 15 |

5. The position description portraying plaintiffs' duties as trial attorneys GS-905-13, is as follows:

JOB SUMMARY

Serves as Trial Attorney in connection with appeals before the Armed Services Board of Contract Appeals (ASBCA) of the Department of Defense which arise under the contracts at DPSC. Appeals to the ASBCA are from Contracting Officers' decisions involving disputes arising as a result of claims by the contractor or the Government in connection with the performance or termination of contracts, as, for example, additional costs incurred by the contractor in being furnished defective Government material; additional costs incurred by delays resulting in stoppage or slowdown of production; additional costs or savings involved in defects in or changes of specifications; controversial interpretations of contract provisions; termination of contracts for the convenience of the Government; excusability of delays giving rise to termination of contracts for

default; etc. Utilizes a specialized knowledge of Government contract law in performance of job.

## JOB CONTROLS

Receives general supervision from Chief Trial Attorney which includes assignment of cases, discussion, conferences and information as to new or revised policies, discussion of unusual and complex problems; incumbent functions independently during progress of assignments with full technical responsibility and wide latitude of discretion. Review is made of contemplated actions as required for adherence to established policy and/or need for additional legal theory.

## MAJOR DUTIES

1. *Prepares appeal action for trial and presents before the Armed Services Board of Contract Appeals*: Assembles and analyzes complete claims files which are involved in actions brought by or against the Government (Contract, GFP, Inspection, Laboratory, Fiscal); studies the files and defines factual and legal issues. Prepares a complete statement of all the facts in the case, including those which require further development, a statement of any difficulties encountered during administration of the contract, showing how disputes arose and were resolved, and prepares physical exhibits to substantiate the stand taken. Investigates the facts. Selects, interviews and prepares prospective witnesses, including expert witnesses for examination and cross-examination at trial; prepares statements and affidavits. Points up those facts which are most advantageous to the Government and the legal arguments which are best supported by precedent decisions, when available. Researches law; prepares and files Answer to Complaint or Memorandum in Lieu of Answer, determining what issues should be controverted, admitted, etc. Prepares and argues all



applicable motions and presents evidence in connection therewith. Prepares Trial Memorandum, opening and closing statements, citations to law and relevant documents for orderly presentation of Government's case. Forwards a copy of each Notice of Appeal, Complaint, Answer, Rule Memorandum (without inclosures), Brief, and ten days prior to date set for hearing, Trial Memorandum containing a summary of the testimony of proposed witnesses to the Counsel, DSA. Amends Answer when deemed necessary or when required by the Board. Participates in pre-hearing conferences before the Board and/or pre-hearing meetings with appellant's attorney to consider simplification of the issues, desirability of amendments of the pleadings, possibility of obtaining admissions of fact and stipulation as to admission into evidence of documents which will avoid unnecessary proof, limitation of the number of expert witnesses and such other matters as may aid in disposition of the appeal or shortening the time and expense of the trial. When deemed appropriate incumbent may move the Board for permission to serve Written Interrogatories or take Oral Depositions. Arranges with the Board, appellants and/or their attorneys for time and place of trial. Determines, when in the best interests of the Government, that a particular case should be settled and negotiates terms of the settlement, with the discussion and advice of the Chief Trial Attorney. Conducts actual trial of the case, cross-examines appellants' witnesses, when advisable, interposes objections to appellant's offers of proof when appropriate, stipulates as to facts, offers such relevant evidence as deemed advisable and admissible under the generally accepted rule of evidence applied in the Courts of the United States in non-jury trials. Studies the transcript and all exhibits; after conclusion of the trial prepares post-trial briefs and reply or rebuttal briefs when appropriate.

2. *Reviews ASBCA decision and takes necessary action as determined advisable*: Reviews all decisions

of ASBCA on appeals handled. Files a Motion for Reconsideration with ASBCA based upon determination that decision is erroneous in whole or in part after consultation with Chief Trial Attorney. If ASBCA denies the Motion or sustains its previous decision and a decision by the Comptroller General (GAO) is desired prior to payment forwards request for such a decision to the Counsel, DSA. Maintains direct contact with the ASBCA, appellants and/or their attorneys, other Governmental agencies, witnesses, etc. in all matters involving assigned appeals.

Performs other duties as assigned.

6. On December 8, 1969, a request for personnel action, SF 52, was submitted to the Office of Civilian Personnel by the Office of Counsel, DPSC, requesting reclassification of the positions of plaintiffs from grade GS-13 to grade GS-14. The forms were submitted and signed by Donnell K. Wolverton, Counsel, Chief Attorney of DPSC. Each contained the following remarks.

> Reclassification to next grade is warranted by standards set forth in the General Attorney Series, GS-905-0. Incumbent's duties and responsibilities meet the requirements of Type III of the Nature of Cases or Legal Problems and Level D of the Levels of Responsibility of said series. Furthermore, his duties and responsibilities are the same as those set forth and identified as Position M1009, Contract Appeals Division, Office of the Staff Judge Advocate, Headquarters Air Force Logistics Command, Wright-Patterson AFB, Ohio, which is classified GS-905-14 [hereinafter AFLC].

7. Supporting data was submitted at some time between the date of the request, and March 23, 1970. This data consisted of a position description for trial attorney (contract), classified as a GS-905-14 at AFLC. Also included in this data was a proposed position description for plaintiffs, corresponding closely to the AFLC position summary.



8. The position description for trial attorney (contract), level GS-905-14, AFLC, reads in pertinent part as follows:

I. INTRODUCTION:

• • • •

B. The purpose of this position is to serve as Trial Attorney for the Department of the Air Force in representing the Government in trials before the Armed Services Board of Contract Appeals involving Air Force contracts.

II. DUTIES AND RESPONSIBILITIES:

A. Reviews for legal sufficiency and furnishes legal advice on findings and decisions to be issued to contractors under Air Force contracts. (10%)

B. Prepares appeal cases for trial and hearing before the Armed Services Board of Contract Appeals. This includes the following: (1) Examination, review and study of all correspondence, contractual documents, and other pertinent documentary evidence as well as a review of all applicable laws, regulations and directives; (2) Preparation of legal opinions, all necessary written pleadings, including answers, motions, briefs, and such other legal papers as required in each case; (3) Interviewing and corresponding with witnesses, including professional and technical experts; (4) Arranging for taking of depositions of witnesses with opposing counsel including preparation of interrogatories and cross-interrogatories to be propounded to such witnesses; (5) Arranging for hearing dates with opposing counsel and for the presence of all Government witnesses at such hearings; (6) plans and develops trial techniques, tactics, legal theories and procedures to be used in the trial of each assigned case. (30%)

C. Based upon a personal evaluation of the evidence and contract provisions, determines when contract appeals cases should be settled by negotiation prior to hearing; conducts such negotiation in con-

junction with the contracting officer and prepares any necessary legal documents to effect such negotiated settlements. (15%)

D. Represents the Government during the trial of assigned appeals. This includes making opening statements, verbal stipulations, examination and cross-examination of witnesses, introduction of evidence, examination and comments on evidence proffered by the contractor, making and explaining legal basis for objections to testimony or other evidence, oral legal argument on issues and evidence, and closing statement. (30%)

E. Determines and develops post-trial procedures and prepares the Government's written brief on each assigned case. This includes consultation with such professional, engineering and other technical experts as necessary, review of the complete verbatim transcript of the case, examination of all documentary evidence, research and examination of all applicable laws, regulations and policy directives and precedent where such precedent exists, and the writing of a legal brief setting out the Government's contentions and the evidence and law supporting them. (15%)

III. CONTROLS OVER WORK:

Works under administrative supervision of the Division Chief but receives no direct professional supervision in performance of duties and responsibilities. Works independently or is assisted by technical experts or other attorneys under his guidance. Is guided by Federal and State laws and regulations, court decisions, decisions of administrative tribunals, decisions of the Comptroller General, and regulations and Directives of the Department of Defense and the Air Force in performance of duties.

• • • •

The "Substantiating Analysis" for this position, comparing the duties and responsibilities portrayed in the above position description with the standards contained



in the General Attorney Series, GS-905-0, are stated as follows:

• • • •

II. *Grade Level Determination*

By reference to the published standards for the GS-905-0 General Attorney series, the trial work for the factor, Nature of the Case, exceeds Type II and and equates to Type III in such aspects as difficulty of legal review, impact of decision and amount of money involved. Level C is exceeded in the nature of functions and supervision and guidance received and Level E is appropriate. Personal work contacts and nature and scope of recommendations equates to Level C. Level D, accordingly, is selected as being most typical of the level of responsibility.

III. *Classification Conclusion*

Type III, Level D equates to GS-14 on the grade-level conversion chart. Position is, therefore, classified as Trial Attorney (Contract) GS-905-14.

• • • •

Evaluation of Grade Level

A. Nature of the Case or Legal Problem

The attached position is characterized by the following features of the attached description and is, therefore, of Type III. Preparation and drafting without instruction and supervision of opinions and legal instruments which involve complex factual and/or policy issues requiring extensive research, analysis, obtaining and evaluating expert testimony in controversial areas, i.e., scientific, engineer and financial fields. The cases and problems encountered may have the effect of substantially broadening or restricting the procurement activities of the United States Air Force. Further, the contractors are usually represented by leading attorneys who are extremely capable and who vigorously protest the position taken by the Government as represented by the Trial Attorney.

B. Level of Responsibility

The level of responsibility for this position is D and characterized by functions described in detail in the attached Job Description but consists essentially of:

(1) Acting as principal attorney in charge of the preparation and presentation of cases before the ASBCA and, in many instances, has the assistance of other attorneys of lower grades or other specialists.
(2) Opposing some of the most distinguished and highly paid attorneys in the country.
(3) The Trial Attorney's recommendations are frequently tantamount to final decisions as to whether to prosecute or settle Appeals.

Accordingly, the position is classified as Trial Attorney (Contract) GS-905-14.

9. On March 23, 1970, the Office of Civilian Personnel (OCP) of DPSC requested additional information concerning, primarily, substantiation for the requested type III classification for plaintiffs. In particular, the OCP requested "2 or 3 examples (for each employee) citing and describing specifically the unusual complexities attributed to Type III cases in terms of Attorney standard's criteria." The elements mentioned were:

(1) Complexity of legal and factual issues
(2) Impact of the case or problem (in economic, social, or political terms) on the public, on relations with . . . governments, . . . or agency . . . operations . . . etc.
(3) Importance of the case or legal action as legal or administrative precedent
(4) Nature of the competition encountered
(5) Nature and availability of precedent decisions
(6) Delicateness of the problem
(7) Public Interest
(8) Money



In addition, information concerning the supervisory relationship of the two trial attorneys and the present supervisor was requested.

10. In response, Mr. Wolverton, Chief Attorney of DPSC, supplied examples of cases handled by both plaintiffs and the following statement concerning the relationship between plaintiffs and their supervisor:

a. The senior trial attorney serves as the coordinating member of the trial section. His responsibility is to assure that current agency policy is followed at all times, that progress is being made in all cases, and that a monthly status report of assigned cases is kept current.

b. Assignment of cases by the senior trial attorney is on a random basis dictated by the workload of each trial attorney, including the senior trial attorney. The complexities of new cases are not analyzed, therefore not fully appreciated, until the assigned trial attorney has studied the complete file. Once a case is assigned to a trial attorney, including the senior trial attorney, it becomes his responsibility to sift pertinent facts, develop a theory of the case, plan strategy, and shepherd the case to its ultimate conclusion. The three trial attorneys confer with each other from time to time to discuss unique aspects of their cases, and to exchange views on strategy and application of current case decisions. While this mutual exchange of views and experience is intended for possible application to assigned cases, final judgments are left to the individual trial attorney.

11. Between April 20 and May 4, 1970, Regina B. Graham, a position classification specialist at DPSC, conducted an audit of the positions of Messrs. Testan and Zarrilli as part of her duties in making recommendations relating to grade level assignments of GS-13 and above. As part of this investigation, the employees were interviewed, discussions with their supervisor, Oscar Moldawer, were held, and one hearing was observed. She concluded that the cases submitted as examples of

plaintiffs' workload in question were properly classified as GS-13.

12. On May 8, 1970, James J. D'Angelillio, Director, OCP, DPSC, confirmed the opinion that the positions of both plaintiffs "appropriately evaluate to the GS-13 level." His opinion states, in pertinent part:

> 2. The Attorney Standards take into consideration two major evaluation factors: (I) Nature of Cases or Legal Problems, and (II) Level of Responsibility. The case treatment in the standard for Factor I reflects the "*minimum*" *characteristic* of the legal situation, and consequently allows for a *broad* span of difficulty within each type. The level of responsibility (Factor II) represents the typical characteristics.
>
> a. With respect to Factor I, the nature of legal cases handled by the incumbents compares favorably with characteristics reflective of Type II, in that difficult legal or factual questions are involved because of the absence of clearly applicable precedents; or it is highly arguable which precedents are applicable to the case at issue because of the complexity of the facts or the different possible constructions which may be placed on either the facts or the laws and precedents involved; the impact of the case affects economically, socially, or politically, either directly or as a legal or administrative precedent, a significant segment of private or public interests (e.g., the manufacturers of a given product, a class of Government contractors, i.e., suppliers of a particular service or product); large sums of money are directly or indirectly involved; or the case is strongly contested.
>
> b. The incumbents consider that the type of cases handled are such as to warrant Type III category. However, no conclusive evidence was found to support that contention. Type III cases, in fact, represent the most difficult type of attorney work situations throughout the entire Federal Government. The scope, magnitude and consequence of legal work prescribed for Type III, transcends that which could



> be recognizable in the subject positions. Even were it possible that some of the trial work might fall within the Type III category, it would necessarily have to predominate for it to be creditable from a classification standpoint.
>
> c. Level of Responsibility—The subject positions function under very general supervision of the Chief Trial Attorney who is responsible to the Counsel for overseeing and coordinating trial activities, assuring adherence to established policies, providing guidance on new legal theory, signing official transmittal of case material and correspondence, maintaining status and progress of work, rating work performance of the incumbents, and keeping Counsel informed of out-of-the-ordinary situations and/or problems warranting his attention. (The Chief Trial Attorney has been ranked at Level E). Within the framework the Trial Attorneys are ranked one level below (Level D). This level recognizes their independent development and presentation of cases and substantial freedom of operation. The combination of Type II cases and Level D responsibility equates to the GS-13 level.
>
> 3. It should be noted that the standard's criteria for the Level E category involves responsibility as the "Principal" Trial Attorney. In view of this, there would be no possibility in this size organization of recognizing or crediting this level of responsibility in more than one position. If all three positions operated on a co-equal basis—Level D would apply.

13. Plaintiffs appealed the May 8, 1970, decision to the U.S. Civil Service Commission, Philadelphia Region, by letter dated May 20, 1970. Information regarding their work was submitted at that time and also by letters dated June 19, June 22 and July 2, 1970. Included in these submissions were lists of the appeals assigned to each plaintiff with the dollar amounts in controversy, rules of the ASBCA, several board opinions on appeals in which one of the plaintiffs participated,

updated lists of assignments, and detailed descriptions of some of the appeals assigned.

14. Plaintiffs' appeals were denied by letter of July 20, 1970, from the Regional Director, U.S. Civil Service Commission, Philadelphia Region. Each letter stated, in part:

> All positions subject to the Classification law contained in Title 5, U.S. Code, must be classified in conformance with published position classification standards of the Civil Service Commission, where these exist. For this reason your position may not be classified on the basis of comparison with the particular Attorney positions in other Government installations, which were cited in your appeal.
>
> * * * *

The standard for the GS-905 series provides for evaluation of positions as to grade level by two main factors: (1) nature of the case or legal problem and (2) level of responsibility.

Our evaluation of your position using these two factors is as follows:

1. *Nature of Cases or Legal Problems*

   Your legal case work most nearly compares with Type II in the standard. A review of the appeal cases assigned you as named in your own appeal shows that in general large sums of money (e.g. about 100,000 dollars) are directly or indirectly involved in each case, as described in the standard under Type II. An aggregation of the sums of money involved in all cases assigned (approximately $3,000,000) may not be used as an evaluation criterion. Rather the sum of money involved per case is the proper criterion. For evaluation at Type III on the basis of money involved, it would be necesary that individual cases frequently involve, directly or indirectly, very large sums of money (e.g. about a million dollars). On the record this criterion does not apply.



In addition, your legal work meets other characteristics described for Type II in the standard as follows: Difficult legal or factual cases are involved because of the absence of clearly applicable precedents due to the newness of the program or the novelty of the issue; the impact of the case or legal problem affects a significant segment of private interests, for example, the manufacturers of a given product or a class of Government contractors.

Overall Type II is appropriate for this factor.

2. *Level of Responsibility*

   We have assigned Level D to this factor. The standard shows the preparation and/or presentation or providing of technical guidance in an administrative hearing before a court of original jurisdiction or appellate court, at Level C, so far as the element of "Nature of functions" is concerned. This compares to the nature of functions in your position. The "supervision received" over your position is evaluable somewhat higher than C. Your written work is not subject to the same detailed review characteristic of C; rather review is for consistency with governing policies. Neither do you receive preliminary instructions with your assignments as at C. Since you try cases before administrative bodies, your person to person contacts also exceed Degree C. Nature and scope of recommendations on the other hand do not exceed C. Overall the factor of "Level of Responsibility" is evaluable as Level D.

   Level E does not apply to your position since your supervisor is the Chief Trial Attorney and acts as the principal attorney. This responsibility is described at Level E in the standard.

By reference to the grade-level conversion chart in the standard, a combination of Type II and Level D equates to grade GS-13.

15. Plaintiffs, on July 27, 1970, requested the Philadelphia Regional Office of the Civil Service Commission to reconsider its decision of July 20 denying reclassification. Further documentation in support of this request was submitted in letters dated July 29, August 21, and October 26, 1970. The documentation included analyses of certain cases handled by both plaintiffs, statements as to the use of expert witnesses, and the job description for a trial attorney (contract) at AFLC as described in finding 8.

16. By letters dated November 13, 1970, plaintiffs were notified that their requests for reclassification were again denied by the Philadelphia Region, Civil Service Commission. Each letter stated, in pertinent part:

> We have very carefully considered the additional information presented regarding your casework and the level of your responsibility. We have determined that our original decision should be reaffirmed. Accordingly, it is our decision that the correct classification of your position is Trial Attorney, GS-905-13.
>
> Our evaluation of your work assignments in comparison with the classification standards for the Attorney Series, GS-905, follows:
>
> 1. *Nature of Cases or Legal Problems*
>
> We find that for the most part your cases are characterized by or compare favorably with one or more of the features identified as Type II in the standard. We cited Type II features in our original decision.
>
> Characteristically, Type III cases have an important impact on major private or public interests, e.g., the development of administrative regulations of the scope of the Armed Services Regulations. Also, Type III are cases characterized by the complex factual or policy issues involved requiring extensive research, analysis, and obtaining and evaluating of expert testimony in controversial areas of scientific, medi-



> cal, engineering, or other highly technical areas. We have evaluated only the Ketchum Laboratories case as fully meeting the criteria above for a Type III case from among the typical examples of your work presented as being your assignments as of April 1970.
>
> The standard provides that if a case or problem does not satisfy the requirements indicated for the level of one of the types, it is identified with the next lower type, because each type is described in terms of the minimum characteristics of the range of difficulty it represents. Thus, while you are engaged in some Type III work, we evaluate most of your characteristic assignments as Type II and not fully meeting the minimum criteria for Type III. Accordingly, Type II is proper for this factor.
>
> 2. *Level of Responsibility*
>
> Your attorney has argued for Level E for this factor in your position. We do not view Level E as being proper for your position. For example, at Level E attorneys often deal with matters of such scope and complexity that they require the concentrated efforts of several attorneys or other specialists. In such circumstances attorneys at this level are normally responsible for directing, coordinating, and reviewing the work of the team. The cases handled by the principal attorney before administrative tribunals in many instances warrant the assistance of one or more attorneys of lower grade or other specialists.
>
> Other than your supervisor, GS-14, you and your co-appellant, also GS-13, are the only nonsupervisory attorneys in your organizational unit. Under the circumstances we affirm our original evaluation of this factor at Level D.

A combination of Type III [sic] cases and Level D responsibility equates to grade level GS-13.

These letters also stated that, in accordance with usual procedures, the files concerning the regional director's decision were being referred to the Classification Appeals Office, Bureau of Personnel Management Evaluation, U.S. Civil Service Commission, Washington, D.C.

17. Plaintiffs requested an interview with the Classification Appeals Office through a letter dated November 25, 1970; a subsequent letter dated December 16, 1970, confirmed a set date and time for the interview, which took place on January 11, 1971. By letter dated January 15, 1971, plaintiffs formally requested the Classification Appeals Office to reopen and reconsider their appeals. On February 23, 1971, the Classification Appeals Office informed plaintiffs that they were properly classified at Trial Attorney GS-905-13. The letter signed by M. L. Etzell, elaborated on the decision as follows:

> We have made a thorough study of all aspects of the appeals. Our review included the data contained in the original submission to our regional office and the information and exhibits submitted to this Office. Our review does not disclose any basis for a finding of probable error in our Philadelphia Region's decision. Accordingly, the decision of the Philadelphia Region that the positions occupied by Messrs. Testan and Zarill[i] are properly classified as Trial Attorney GS-905-13 remains the final decision of the Commission.
>
> In our independent evaluation careful consideration was given to the level-distinguishing elements of the casework and legal problems stressed by you [plaintiffs' attorney] and your clients. As indicated in the standards, these include complexity of legal and factual issues, impact of the case, amount of money involved, importance of the cases in setting precedents, nature of the competition and delicateness of the problem. The standards instruct that these elements are not independent of one another and their relationship must be considered in evaluating the nature of



the case or legal problem. It is stated, "For example, the economic, political, or social impact of a case cannot be considered apart from its importance as a legal or administrative precedent."

In describing Type III cases or legal problems the standards highlight three characteristics: (1) involvement with extremely complex and difficult legal questions or factual issues requiring a high order of original and creative legal endeavor; or involvement with complex factual or policy issues requiring extensive research, analysis and obtaining and evaluating expert testimony or information in controversial areas of scientific, financial, corporate, medical, engineering, or other highly technical issues; (2) involvement with cases or problems that can have the effect of substantially broadening or restricting the activities of an agency, that have an important impact on a major industry whose economic position affects the health and stability of the general economy, that have an important impact on major private or public interests, or that have included problems of unusual delicacy; (3) involvement with cases of very large sums of money that are vigorously contested and are of nationwide interest.

In your further appeal to this Office you claim that the types of cases handled by the appellants meet criteria (1) because they have complex factual issues requiring extensive research, analysis, and obtaining and evaluating expert testimony in "controversial areas of science, financial, corporate, medical, engineering or other highly technical areas."

Our analysis of the exhibits revealed that the majority of cases do not meet criteria (1) in terms of extensiveness of research required to establish facts and to evaluate controversial professional or technical matters. Type III cases described in the standards represent the most difficult cases handled by attorneys in the government, as indicated in the introduction to the standards. An example of a Type III case involving controversial scientific or medical areas is one relating to the food and drug laws where dispute

arises over definitions and standards of identity, tolerances for poisonous or deleterious substances, pesticides, additives; an example of a controversial corporate or financial case is one with respect to the administration of foreign-owned assets involving billions of dollars, intercorporate relationships, financial operations of a large industrial enterprise, and numerous interested persons.

With regard to the other two characteristics, we find no evidence that the cases of the appellants have major economic, social, political or agency impact, or involve very large sums of money.

Illustrations furnished in the standards for Type II are comparable to and more indicative of the appellants' legal effort. We consider the degree of difficulty of the legal problems and issues, their effect, and the sums of money involved, characteristic of this level.

For the second factor in the standards, Level of Responsibility, we agree with our regional office that the functions of the appellants fall between Levels C and E. You [plaintiffs' attorney] have argued for your clients that since they serve as the principal attorney in charge of a case, this satisfies the requirement for assignment of Level E to the position. The fact that your clients handle their assignments independently does not make them a "Principal Attorney" within the meaning of our standards. The Level E function in the standards is described as follows: "Acts as principal attorney *in charge* of the preparation and presentation of cases before administrative tribunals or before the trial or appellate courts, where the cases (a) are of such *scope* that they may, in many instances, warrant the *assistance* of *one* or *more attorneys* of lower grade or other specialists *and* (b) are of *such importance* that they frequently involve matching professional skills against some of the *most* distinguished and highly paid legal talent in the country." (Underlining supplied.) We find no evidence of such a function being performed.



In conclusion, our finding of Type II work and Level D responsibility converts to grade GS-13 for the appellants' position by reference to the Grade-level Conversion Chart in the standards.

18. On April 20, 1971, plaintiffs appealed the decision of the Classification Appeals Office to the Commissioners of the Civil Service Commission, calling their attention to an AFLC announcement assigning a GS-14 level to a position entitled "Trial Attorney (Contract)." In addition, plaintiffs referred to a directive of DSA Headquarters, Cameron Station, Alexandria, Virginia, entitled "Management Control of High Grade Positions and Average Grade Structure," which limited increases in GS-14 positions to a corresponding number of decreases in GS-15 positions. It was plaintiffs' position at that time that the directive had the effect of subverting the classification system and was itself an arbitrary action.

By letter dated July 14, 1971, Robert B. Bates, Assistant to the Commissioners (Appeals), notified plaintiffs that their request to reopen the case had been denied. The letter read, in pertinent part:

> We have carefully considered the written argument in support of the request to reopen this case, along with the documents enclosed with your letters. We find, however, that the representations made do not indicate probable error in the decision of the Classification Appeals Office. With regard to Announcement No. L-3 (1970) for Trial Attorney (Contract) positions for AFLC positions at Wright-Patterson Air Force Base, Ohio, we find that the positions covered by this announcement are not the same as the positions occupied by Messrs. Testan and Zarilli. In any event, the Commission does not classify a position by comparison of the duties of the position with the duties of positions in other agencies, but determines the proper classification of a position by comparison of the duties with the applicable classification standards.
>
> With regard to the memorandum dated December 11, 1968 on the subject "Management Control of High

Grade Positions and Average Grade Structure" issued by W. W. Vaughn, Major General, USA, Deputy Director, Defense Supply Agency, Headquarters, Cameron Station, Alexandria, Virginia, we find that this memorandum, and the other related documents submitted with your April 20, 1971 letter, have no bearing on the issue regarding the classification of the positions of the appellants. These documents pertain to administrative controls over the number of higher-grade positions, and would not serve as a bar to the promotion of an employee whose position warranted a higher classification.

With regard to your arguments that other agencies have Trial Counsel before the Armed Services Board of Contract Appeals who are classified at GS-14 under General Attorney Series, GS-905, we can only repeat that positions in one agency are not classified by comparing them with positions in other agencies, but are classified by a comparison of the duties of the individual positions with the applicable classification standards. In the case of the appellants, it has been determined that the duties of their positions compare closely with the classification standards at the GS-13 level.

In view of the above we find that the representations made in support of the request to reopen this case do not indicate an erroneous interpretation of law or regulation or a misapplication of established policy by the Classification Appeals Office in its February 23, 1971 decision in the case, and do not otherwise meet the criteria for reopening a previous decision of the Classification Appeals Office. The request to reopen this case, therefore, must be and is, denied.

19. The structure and functions of the Contract Appeals Directorate, Office of the Staff Judge Advocate, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, were described by William F. Hebert, Director, as follows:

> 2. The mission of the Directorate of Contract Appeals is to:



a. Review the legal sufficiency of, and advise on all proposed findings and decisions of all Air Force Contracting Officers under the Disputes procedures of all Air Force contracts.

b. Represent the Secretary of the Air Force in the defense of all appeals under Air Force contracts before the Armed Services Board of Contract Appeals.

c. Prepare litigation reports for, and otherwise assist, Headquarters USAF, and the Department of Justice in litigation before Federal courts involving Air Force contracts.

d. Assist Air Force Contracting Officers in implementing ASBCA decisions and in negotiating settlements of disputes. The Office of the Staff Judge Advocate, Air Force Logistics Command, has been delegated by the Secretary of the Air Force the authority to perform the above functions Air Force wide. As part of that Office, the Directorate of Contract Appeals performs this mission for the entire Department of the Air Force. The Director of the Directorate of Contract Appeals has been designated as the Chief Trial Attorney of the Air Force.

> 3. The Directorate of Contract Appeals consists of a Director position occupied by an Air Force Colonel, a Deputy Director position manned by a Lt. Colonel and twelve Trial Attorney positions. * * * [T]he Directorate is divided into two Trial Divisions, each under the supervision of a Division Chief who also carries a full case load. The GS-14 Trial Attorneys are under the administrative supervision of the Division Chief, but receive no direct professional supervision from a level below the Director/Deputy Director. The GS-13 level Trial Attorneys receive both administrative and professional supervision from the Division Chief. The GS-15 Senior Trial Attorneys operate independently of the Division organization and are responsible directly to the Director/Deputy Director. They are responsible for handling the most difficult and involved cases the Directorate

receives. When appropriate, they provide direct advice to officials at the DoD, Air Force Secretarial and Air Staff levels, the Department of Justice and major command levels concerning complex, high-dollar and controversial cases involving the Air Force. * * *

4. A review of my available records indicates that, as of 31 December 1971, my office had 227 appeals currently pending before the Armed Services Board of Contract Appeals with a total dollar value of $174,107,494.00. All but 3% of the dollar volume originated with two commands, the Air Force Logistics Command (AFLC) and the Air Force Systems Command (AFSC). The Air Force Logistics Command is a major Air Force command whose function is to provide logistics support; that is, material and services for USAF organizations, other military services, other Government agencies, contractors, and military assistance programs. The Air Force Systems Command is also a major Air Force command. Their mission is to serve as the single manager of all phases of acquisition of complete weapons and aerospace systems.

5. The Supply and Research and Development contracts utilized by AFLC and AFSC encompass Firm Fixed-Price, Fixed-Price with escalation, Fixed-Price with various incentive features, Fixed-Price with prospective and retroactive redetermination; all cost-type contracting including: Cost-Plus-Fixed-Fee, Cost-Plus-Incentive-Fee, Cost-Plus-Award-Fee; and occasionally other types of special purpose contracts. These contracts are procured by various methods, such as Formal Advertising including two-step formal advertising, Negotiation including Sole-Source, and involve procurement policies such as Total Weapon Systems Package Procurement, Multi-Year Procurement and Prototyping.

6. In addition to the often encountered issues of construction changes, defective specifications, latent defects, warranties, and terminations, these contracts



generate appeals under the Disputes clause involving issues of: (1) Cost Principles including allocation of and allowability of independent research and development costs, excess facilities and idle capacity, employee fringe benefits, pre-contract costs, rental and leasing costs, severance pay, and special tooling and special equipment costs; (2) Patent royalty payments; (3) Bonds, insurance and indemnification; (4) Taxes; (5) Labor law including the Fair Labor Standards Act and the Service Contract Act; (6) Foreign purchases that involve the examination of and interpretation of international agreements; (7) Transportation including warehousing and drayage; (8) Value engineering change proposals; (9) Defective pricing; and (10) Impossibility of performance.

7. Appeals arising out of ALFC and AFSC contracts contain some of the most complex factual issues tried before the Armed Services Board of Contract Appeals. Trials lasting four to six weeks are not unusual, and trials of one week duration are common. The majority of these trials require the development and use of expert testimony in the fields of aerospace and civil engineering, auditing and other technical areas. These appeals are commonly presented by teams of attorneys, because of the complexity and amount of money involved. The contractors are routinely represented by the most prestigious and competent counsel nationally in the field of Government procurement law and also maintain large in-house staffs of attorneys. Firms such as Sellers, Conner and Cuneo, Washington, DC; Wachtel, Wiener and Ross, Washington, DC; McNutt, Dudley and Eastwood, Washington, DC; Reavis, Pogue, Neal and Rose, Washington, DC; Miller, Groezinger, Pettit and Evers, San Francisco; Rain, Harrell, Emory, Young and Doke, Dallas, Texas; Manleleone and McCrory, Los Angeles; vom Baur, Coburn, Simmons and Turtle, Washington, DC; and Holman, Marion Perkins, Coie and Stone, Seattle,

Washington, frequently appear as opposing counsel.

* * * *

10. I have examined the affidavit of Donnell K. Wolverton, furnished as Plaintiffs' Exhibit 2, the Position Descriptions of Messrs. Testan and Zarilli [sic] as contained in Defendant's Exhibit 2, and I have reviewed Plaintiffs' Exhibits 4 and 5, the examples of Plaintiffs' work products. I disagree with the conclusions of Mr. Wolverton in that I do not think that the duties and responsibilities of Messrs. Testan and Zarilli [sic] are identical to those performed by the Trial Attorneys in my office. I feel that the activities of our Trial Attorneys are extremely more broad and complex as to the type of contract involved in their appeals, the subject matter of the appeals, and the amount of money involved. The requisite degree of professional versatility and expertise required to meet the requirements of the appeal function at a Departmental level is far greater than that required to perform a more limited but similar function at a restricted field activity level.

11. On 25 January 1972, as a member of the Ad Hoc Civilian Attorney Committee, AFLC, I had occasion to participate in the interview of Plaintiff Testan for our GS-*15* Trial Attorney position covered by Announcement No. L-3 (1972). During the interview, it was gleaned that his experience had been limited to the trial of disputes arising from fixed-price supply type contracts. He indicated his trial workload was about twelve cases per year. He also indicated that his reviews of Contracting Officers' final decisions were also limited to fixed-price contracts and that most of his cases involved default actions. He was only incidently [sic] familiar with other types of contracting. His advisory duties over the years had been limited to the center where he was employed. [Emphasis added.]

20. The position description for senior trial attorney (GS-15) at the Staff Judge Advocate's Office, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, reads, in pertinent part, as follows:



I. INTRODUCTION:

* * * *

B. This position is that of a Senior Trial Attorney performing the functions set out above for the Department of the Air Force in connection with the most difficult and most important cases arising within the Air Force.

II. DUTIES AND RESPONSIBILITIES:

A. Reviews for legal sufficiency and furnishes legal advice on findings and decisions to be issued to contractors under Air Force contracts. When extensive experience, expertise and judgment are expeditiously required, is sent to Air Force activities to review and approve proposed findings and decisions of high dollar value, public interest and national defense significance. A position of trust requiring approval of the issuance of such findings and decisions without further professional review. (10%)

B. Prepares the most complex and important appeal cases for trial and hearing before the Armed Services Board of Contract Appeals. This includes examination and evaluation of evidence, preparation of pleadings, interview and evaluation of witnesses, including technical experts concerning sophisticated and complex areas of technology and development, taking of depositions, preparation of interrogatories, planning trial techniques. Supervises the professional efforts of Trial Attorneys assigned to assist him. (30%)

C. Based upon a personal evaluation of the evidence and contract provisions determines when contract appeals cases should be settled by negotiation prior to hearing; conducts such negotiation in conjunction with the Contracting Officer and prepares any necessary legal documents to effect such negotiated settlements. (10%)

D. Acts as principal attorney in charge of the preparation and presentation of assigned appeals be-

fore the Armed Services Board of Contract Appeals. Exercises full responsibility for the development and presentation of the cases assigned, including making opening statements, verbal stipulations, examination and cross-examination of witnesses, introduction of evidence, examination and comments on evidence proffered by the contractor, making and explaining legal basis for objections to testimony or other evidence, oral legal argument on issues and evidence, and closing statements. Supervises other Trial Attorneys and technical personnel assigned to assist him for the duration of the trial. Is frequently matched against the most highly paid legal talent with distinguished national reputations. (30%)

E. Determines and develops post-trial procedures and prepares the Government's written brief on each assigned case. This includes consultation with such professional, engineering and other technical experts as necessary, review of the complete verbatim transcript of the case, examination of all documentary evidence, research and examination of all applicable laws, regulations and policy directives and precedent where such precedent exists, and the writing of a legal brief setting out the Government's contentions and the evidence and law supporting them. (10%)

F. Renders oral advice to contracting officers, procurement officials and Government attorneys throughout the Air Force on significant rights and obligations arising under Air Force contracts. Consults with and is consulted by procurement policy, audit and fiscal officials at DOD, Air Force Secretarial level and Hq USAF on cases involving or impacting important procurement precedents. (10%)

III. CONTROLS OVER WORK:

Works under the administrative and policy supervision of the Director (Chief Trial Attorney), JAB, but is expected to exercise requisite independent professional judgment and discretion in the performance of his duties and responsibilities. Works independently or is assisted by technical experts or other attorneys under his guidance. Is guided by Federal and State laws and regulations, court decisions, decisions of administrative tribunals, decisions of the Comptroller General, and regulations and Directive of the Department of Defense and the Air Force in performance of duties.



Under the "Substantiating Analysis" for this position, the duties and responsibilities assigned were compared with the General Attorney Series, GS-905-0, in the following language:

III. GRADE LEVEL DETERMINATION:

1. Nature of Cases or Legal Problems

• • • •

c. Position compares favorably with Type III. Directly and indirectly the money amounts of cases listed are associated with contracts that range from several hundred thousand dollars to several million dollars. They are frequently contested strongly and vigorously in formal proceedings by corporations employing extremely capable legal talent. Cases involve complex issues, e.g., defaults, fraud, terminations, disputed claims for increased costs, disputed action to recoup excess costs or charges. The cases involve interpretation of contract clauses due to ambiguity of language and involve FPI, FPR, CPFF, time and material contracts for services and equipment. Cases are related to all areas since the Staff Judge Advocate renders legal service to all Commands. A work cycle of 1-2 years is determined a reasonable time period within which the employee of this position can be expected to perform all aspects of this position from the least to most difficult. Incumbent is required to travel nationwide throughout all the Commands to prepare cases. Since he carries 20-25 cases concurrently, the problems of scheduling and completing cases compounds the difficulty and complexity of work.

2. Level of Responsibility

* * * *

b. Level E

(1) Nature of functions—Reviews cases for agencies responsible for the conduct of litigation in Federal courts to determine whether to recommend prosecution. Reviews, for agencies responsible for appellate litigation, records of suits for or against the government in which the decision was unfavorable to the government to determine whether to recommend appeal to a higher court.

(2) Supervision and guidance received—Attorneys are expected to carry out any assignment without preliminary instruction. Supervisor may discuss the significance of the problem. Incumbent independently conducts the investigation or negotiation, plans the approach, and develops the completed product; or represents the government at the conference, hearing, or trial. Completed work in the advisory or legislative and regulatory areas is reviewed before it is signed out.

(3) Personal work contacts—Confers or negotiates with top administrative personnel in the agency and private business on important legal and policy questions. Tries cases before courts or administrative bodies.

(4) Nature and scope of recommendations and decisions—Advice on the interpretation of law or on proposed changes in legislation, policy, and regulations is often given directly to heads of programs. In some instances recommendations are made through supervisors but these recommendations are usually tantamount to final decision. Attorneys at this level often deal with matters of such scope and complexity that they require the concentrated efforts of several attorneys or other specialists. In such circumstances attorneys at this level are normally responsible for directing, coordinating, and reviewing the work of the team.



c. Subject position meets level E in all aspects as cited above.

IV. SUMMARY:

Type III, Level E equates to GS-15 on the Grade-Level Conversion Chart. * * *

21. The position description for trial attorney (contract), level GS-905-*13*, at the Staff Judge Advocate's Office, Air Force Logistics Command, Wright-Patterson Air Force Base, reads, in pertinent part, as follows:

II. DUTIES AND RESPONSIBILITIES:

A. Reviews for legal sufficiency and furnishes legal advice on findings and decisions to be issued to contractors under Air Force contracts. 10%

B. Prepares appeal cases for trial and hearing before the Armed Services Board of Contract Appeals. This includes the following: (1) Examination, review and study of all correspondence, contractual documents, and other pertinent documentary evidence as well as a review of all applicable laws, regulations and directives; (2) preparation of legal opinions, all necessary written pleadings, including answers, motions, briefs, and such other legal papers as required in each case; (3) Interviewing and corresponding with witnesses, including professional and technical experts; (4) arranging preparation of interrogatories and cross interrogatories to be propounded to such witnesses; (5) arranging for hearing dates with opposing counsel and for the presence of all Government witnesses at such hearings; (6) Plans and develops trial techniques, tactics, legal theories and procedures to be used in the trial of each assigned case. 30%

C. Based upon a personal evaluation of the evidence and contract provisions, recommends to the Division Chief, in appropriate cases, that a determination should be made to settle appeals by negotiation prior to a hearing; conducts such negotia-

tion in conjunction with the contracting officer and prepares any necessary legal documents to effect such negotiated settlements, for approval by the Division Chief. 15%

D. Represents the Government during the trial of assigned appeals. This includes making opening statements, verbal stipulation, examination and cross-examination of witnesses, introduction of evidence, examination and comments on evidence proffered by the contractor, making and explaining legal basis for objections to testimony or other evidence, oral legal argument on issues and evidence, and closing statements. 30%

E. Determines and develops post-trial procedures and prepares the Government's written brief on each assigned case. This includes consultation with such professional, engineering and other technical experts as necessary, review of the complete verbatim transcript of the case, examination of all documentary evidence, research and examination of all applicable laws, regulations and policy directives and precedent where such precedent exists, and the writing of a legal brief setting out the Government's contentions and the evidence and law supporting them. 15%

III. CONTROLS OVER WORK:

Works under general administrative and professional supervision of the District Chief. Works independently or as assisted by technical experts. Is guided by Federal and State laws and regulations, court decisions, decisions of administrative tribunals, decisions of the Comptroller General, and regulations and Directives of the Department of Defense and the Air Force in performance of duties.

No "Substantiating Analysis" was submitted by the parties for this particular position.

22. Richard C. Solibakke, Chairman, Armed Services Board of Contract Appeals, responded to an inquiry made by plaintiffs' attorney as follows:



My knowledge on this subject [grades of civilian trial attorneys appearing before the ASBCA] is from informal sources and I do not know the grades of all of the civilian trial attorneys appearing before us. I am familiar, however, with the grades of a number of such attorneys. There is some variance, *but the predominant present grade appears to be a GS-14.* More specifically, all of the civilians in the office of the Air Force Chief Trial Attorney are GS-14's. The single civilian in the office of the Army Chief Trial Attorney is a GS-14. The full time Division trial attorneys in the Corps of Engineers [of the Army] are GS-14's, with one exception, who is a GS-13. The Corps of Engineers District Counsel [field offices of the Corps] who sometimes appear as trial attorneys before us are approximately two-thirds GS-14's and one-third GS-13's. Within the Navy offices which appear before us there is considerable variation, ranging from an occasional GS-15 presenting a case, down through an occasional GS-12. The average in the Navy is GS-13 or 14. I have very little personal knowledge on the grade structure for DSA trial attorneys * * *. [Emphasis and interpolated matter added.]

23. Oscar A. Moldawer, Chief Trial Attorney, DPSC, stated as follows:

* * * Since their initial assignment, Messrs. Testan and Zarrilli have handled numerous cases of considerable complexity, involving claims which have aggregated several millions of dollars and have been pitted against some of the most outstanding attorneys in the country specializing in Government contract law.

* * * The duties and responsibilities of my Trial Attorneys are identical to those performed by Trial Attorneys of the Contract Appeals Division of the Office of the Staff Judge Advocate, Headquarters Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, who have been classified by the U. S. Civil Service Commission under the Gen-

eral Attorney Series (GS-905-0) as grade GS-14. Both Trial Attorney positions call for identical practice before the same Armed Services Board of Contract Appeals.

24. Donnell K. Wolverton, Counsel, DPSC, described their work as follows:

> * * * The duties and responsibilities of my Trial Attorneys are identical to those performed by Trial Attorneys of the Contract Appeals Division of the Office of the Staff Judge Advocate, Headquarters Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, who have been classified by the U. S. Civil Service Commission under the General Attorney Series (GS-905-0) as grade GS-14. * * *
>
> * * * The trial section of my Office is staffed by Herman R. Testan and Francis L. Zarrilli, Esquires, as Trial Attorneys at grade GS-13 and Oscar A. Moldawer, Esquire, as Chief Trial Attorney at grade GS-14. The Chief Trial Attorney serves as coordinating member of the section and his responsibility, in addition to trial of cases before the Armed Services Board of Contract Appeals, is limited to assure that DPSC policy is followed, progress is made on all assigned cases and that a current status report is maintained. The assignment of cases is accomplished on a random basis depending solely on the workload of the 3 members of the trial section at the time of assignment. Once a case is assigned, the particular attorney assumes complete and sole responsibility therefor, using independent judgment in development of the theory of the case, selection of witnesses, use of trial tactics and strategy, preparation of all pleadings, motions, briefs, correspondence, etc., until a final decision is rendered by the Armed Services Board of Contract Appeals; or, if warranted by applicable facts and law in the sole judgment of the assigned attorney, the case may be settled before, during or after trial. * * *



Mr. Wolverton also concluded that the positions occupied by plaintiffs met the standards of type III, level D, of the classification series and, therefore, merited GS-14 grades.

25. Plaintiffs have submitted voluminous documentary evidence as examples of their work products. These submissions were reviewed by Lenora R. Fine, Supervisory Position Classification Specialist, OCP, DSPC, DSA, who classified each individual submission, with one exception, as a type II case. The one case not classified was a bill of complaint written by Mr. Testan which she considered "inadequate for analysis of potential difficulty."

Jesse Amass, Deputy Chief, Classification Appeals Office, U. S. Civil Service Commission, also received these submissions for evaluation purposes. The materials were referred to Patricia Fagge, Personnel Classification Specialist, Classification Appeals Office, who reported that the majority of the cases reflected various factors characteristic of type II rather than type III. As a result of her report, Mr. Amass concluded that the exhibits "do not tend to establish that any error has been made in the interpretation and application of the standards to the facts. The plaintiffs would appear to be properly classified as Trial Attorneys GS-905-13 based on our review of those materials."

Ms. Fagge's analysis of the materials reads as follows:

> We have thoroughly reviewed the examples of cases submitted by Messrs. Herman R. Testan and Francis L. Zarrilli in support of their contention that the nature of their cases or legal problems meet the criteria for Type III and that their level of responsibility meets the criteria for Level E as described in the Civil Service Commission's published standards for the General Attorney Series GS-905. Most of the exhibits post-date the period of appeal consideration previously by the Commission and, therefore, constitute new evidence not heretofore considered.
>
> The standards describe under Factor I the minimum characteristics of the most difficult cases

handled by attorneys in the Federal government. According to the standards those cases involve (1) *extremely* complex and difficult legal questions or factual issues which require a *high* order of *creative* and *original* legal endeavor in order to obtain a reasonable balance of conflicting interests; or complex factual or policy issues requiring *extensive* research, *analysis* and evaluation of expert testimony or information in *controversial areas* of scientific, financial, corporate, medical, engineering, or other highly technical areas; (2) impact on agency activities or major industries whose economic position affects the health and stability of the general economy, or important impact on major private or public interests; or problems of unusual delicacy, such as fraud cases, because of the serious consequence of error and the great burden of proof assumed by the Government; (3) very large sums of money (e.g., about a million dollars) and/or they are frequently *virorously* [sic] contested by *extremely* capable legal talent (e.g., a major anti-trust case); and there is nationwide interest in the cases.

In order to meet the criteria for Type III a majority of the cases must be of the complexity, scope and impact described under one of the three characteristics.

In our opinion, the cases do not meet the minimum characteristics for Type III. Rather, we find that the majority of the cases are characterized variously by the presence of difficult legal or factual questions, novelty of issues, large sums of money (about one hundred thousand dollars), or the case or legal problem affects economically, socially, or politically, either directly or as a legal or administrative precedent, a significant segment of private or public interests, such as a class of Government contractors. [sic] These are Type II characteristics.

With respect to Factor 2, Level of Responsibility, we do not find that the plaintiffs have submitted evidence that they exceed the Level D evaluation assigned by all levels of review in the Government.



Factor 2 also describes three levels of intensity—A, C, and E. The intervening levels of B and D are used when a position's responsibilities fall in between.

The plaintiffs exceed Level C because of the independence with which they work. They do not meet Level E in any aspect. Trial work is cited in the standards of both Level C and Level E, so that fact alone does not qualify the position for Level E. However, because their supervisor, the Chief Trial Attorney, GS-14, does not give the plaintiffs preliminary instructions with assignments nor detailed review of the work accomplished, as described at Level C, and because they fully prepare and present their cases, Level D is the proper evaluation for this factor.

In conclusion, we do not find that material evidence has been submitted that has not already been considered and that an error has been made in the interpretation and application of standards to the facts.

## CONCLUSION OF LAW

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are entitled to reclassification to grade GS-905-14.

SUPREME COURT OF THE UNITED STATES

No. A-265

UNITED STATES, PETITIONER

*v.*

HERMAN R. TESTAN and FRANCIS L. ZARRILLI

---

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 16, 1974.

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 17 day of October, 1974.



SUPREME COURT OF THE UNITED STATES

No. A-265

UNITED STATES, PETITIONER

*v.*

HERMAN R. TESTAN and FRANCIS L. ZARRILLI

---

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

---

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including December 16, 1974.

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 19th day of November, 1974.

# SUPREME COURT OF THE UNITED STATES

## No. 74-753

UNITED STATES, PETITIONER

*v.*

HERMAN R. TESTAN and FRANCIS L. ZARRILLI

## ORDER ALLOWING CERTIORARI
Filed February 18, 1975

The petition herein for a writ of certiorari to the United States Court of Claims is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 573670 147